

IN THE MATTER OF the HUMAN RIGHTS CODE, 1981 S.O. 1381
chapter 53 as amended

AND IN THE MATTER OF the Complaint made by Mr. Man S. Makkar
of Willowdale, Ontario, alleging discrimination in employment
by the City of Scarborough

DECISION OF THE BOARD OF INQUIRY

Board of Inquiry

Paula Knopf

Dates and Place of Hearing

October 30, 1985;
January 15 and 16, March 4,
5 and 6, April 11,
August 13, 19, 26, 27 and
29, and December 9, 1986;
January 21, February 13 and
February 20, 1987

In Toronto, Ontario

Appearances

J. I. Laskin, for the
Human Rights Commission

G. N. Lewchuk for the
Complainant

P. R. C. Sanderson, Q.C. and
P. Parasieka for the
Respondent



Introduction

This is a complaint filed by Mr. Man Makkar alleging that he was terminated by the City of Scarborough (the City) from his position of Senior Planner, because of his race, creed, colour, age and/or ethnic origin. The case is a very disturbing one because it involves a complainant who was terminated at age 50 in what he had considered the midst of his professional career. Since his termination, Mr. Makkar has been unable to obtain employment and so it appears that his career has been inalterably affected by the events which gave rise to the case. Because of the seriousness of the allegations made by Mr. Makkar and because of the complexity of the issues raised by the case, the proceedings covered 16 days of hearing. Out of respect for the parties' positions and the efforts made by counsel on behalf of the parties, this award goes into more detail and is longer than one would normally expect. However, the extensive review is necessary due to the nature of the case as was presented.

The original complaint, as filed, named not only the City of Scarborough but also its agents and servants, Lorne Ross, Peter Poot and Kenneth Whitwell as parties to this complaint. On the second day of the proceedings, after opening submissions had been made, counsel for the Commission announced that the Commission no longer wished to proceed against the individual respondents personally. Leave to amend the style of cause was accordingly granted. Counsel for the respondent then asked the Board to award costs against the Commission for one day of counsel fee for each of the individual respondents because of the additional preparation that was required as a result of their original inclusion and because of the emotional strain and embarrassment suffered by the individual respondents owing to

their inclusion as parties to these proceedings. The Board of Inquiry reserved judgment on that request so that evidence could be produced in the course of the hearing on the matter. However, on the last day of the proceedings, counsel for the City withdrew the request for costs and the matter therefore needs no adjudication. However, this Board of Inquiry feels compelled to comment that because of the tremendous impact that can be caused upon a person as a result of an allegation of a violation of the Human Rights Code, the Commission should exercise great caution when it decides to name an individual as a party to proceedings. Individuals should not be named unless there is a real need to include them as parties and unless the Commission has a real intention to proceed against them. This is especially so where there is a corporate respondent and no practical need to name individuals in order to process the claim.

The Facts

Mr. Makkar is a man of great personal dignity and achievement. He is 52 years' old, of East Indian background and a member of the Sikh religion. He is highly educated. He received a Bachelor of Arts degree from the University of Punjab, a Master of Arts degree from the University of Agra and thereafter a Graduate Diploma from the University of Nottingham in Town and City Planning. He worked for the City of Glasgow, Scotland for a period and then emigrated to Canada in 1967. He was almost immediately hired by the City of Scarborough as a Planner. He is a member of the Canadian Institute of Planners and the British Royal Town Planning Institute of England. While Mr. Makkar claims to have had the "top" credentials in the Planning Department in Scarborough, the evidence does not bear this out. However, the evidence does establish that his qualifications and professional background place him among the top in the department. It should also be noted that he has upgraded and

expanded upon his training by taking an "effective writing" course in 1977 and a computer course in 1983. He is clearly a man of great intellectual curiosity, capability and achievement.

I shall now outline the chronology of events that gave rise to this case, but it must be recognized that the following recital of events constitutes only a glimpse of all the evidence adduced. This Board of Inquiry heard sixteen days of evidence and argument and obviously all the details brought out in the course of the hearing cannot, and need not, be repeated here. Instead, only the most relevant facts and evidence will be set out and discussed.

As stated above, Mr. Makkar was hired in 1967 by the City in the Planning Department as a Planner. At that time, Mr. Donald Easton was the Commissioner of Planning. Mr. Makkar received a salary increment each year based upon merit, until he reached the maximum of the salary level for his category which occurred in or around 1970.

Early in his employment with the City, Mr. Makkar and his wife enjoyed a social relationship with another Planner, Mr. Peter Poot, and his wife. The two couples dined at each other's homes and Mr. Poot assisted Mr. Makkar by giving him rides to work and helping him learn to drive in order to obtain a driver's licence. This relationship is of very great significance to these proceedings. However, the friendship waned and while there is some discrepancy as to the timing of this, the social contact ceased in the early 1970's. The reason why the friendship ended is unclear. Mr. Makkar attaches it to his discovery that Mrs. Poot's father was a member of the Nazi army and that the Poots shared the Nazi philosophy. Mr. Poot admits his father-in-law was in the German army but firmly denies any Nazi sympathies. He also suggested there was no serious rift

between the two families and that his wife considered that he owed the Makkars a dinner invitation up until these proceedings began. Frankly, nothing much turns on why the relationship was not maintained. The important factor is that from approximately 1968 until the early 1970's the Makkar and Poot families enjoyed a social relationship outside of the workplace that waned in the early 1970's. Mr. Poot was in a supervisory position by the early 1970's and Mr. Makkar worked under him for a short time around 1972. There seems to have only been one instance of friction between them during that time when a criticism was leveled by Mr. Poot against Mr. Makkar which Mr. Makkar considered "unfounded".

However, a serious incident occurred between these two men in November of 1973 that has haunted their relationship until this day. At the time of this incident, Mr. Makkar was not working under Mr. Poot. Mr. Makkar was interested in a Senior Planner's position and applied for an opening which had become available. Mr. Poot testified that he discussed Mr. Makkar with Commissioner Easton and recommended to Commissioner Easton that Mr. Makkar was "not ready" for a Senior Planner's position. Mr. Poot testified that at Mr. Easton's suggestion, Mr. Poot invited Mr. Makkar to have lunch with him at a restaurant to discuss this. The testimony of the two men differed dramatically on the details of what occurred at that luncheon meeting. Mr. Makkar claims that Mr. Poot asked him to resign. Mr. Makkar ultimately admitted that he could not recall the exact words used by Mr. Poot, but Mr. Makkar repeatedly testified that Mr. Poot said, "These jobs are not meant for you and me." At times Mr. Makkar suggested Mr. Poot explicitly said that, "These jobs are not meant for East Indians." However, this allegation is strange because Mr. Poot is not an East Indian. Mr. Makkar ultimately admitted that it was only his impression that Mr. Poot was telling him that he had no

future in the department and/or no hope of getting a Senior Planner's position because of his East Indian background. Yet Mr. Makkar admits that Mr. Poot may not have said "East Indian", just that, "These jobs are not meant for you and me," implying that they are not meant for immigrants.

Mr. Poot himself is an immigrant from Holland. Mr. Poot denies making any comments of such a nature. He claims that the luncheon was held simply at Commissioner Easton's request so that Mr. Poot could informally discuss Mr. Makkar's application for the Senior Planner position. Mr. Poot said he did not feel that Mr. Makkar was ready or able to get the promotion and that Commissioner Easton wanted Mr. Poot to tell Mr. Makkar this directly.

It is clear that Mr. Makkar was very disturbed by the luncheon. He went to the Personnel Department to complain immediately thereafter and a meeting was scheduled with representatives of the Union and Personnel, as well as the Commissioner, Mr. Poot and Mr. Makkar. It should be noted that at that time, Mr. Makkar's position was within the bargaining unit and so the Union was involved. [Shortly thereafter, the position was removed from the bargaining unit.] Mr. Makkar claims that he related the luncheon conversation to the people at the meeting in the same way as he did to this Board of Inquiry and that Mr. Poot offered a public apology thereafter. On the other hand, Mr. Poot claims that Mr. Makkar made no mention of any racial comments or innuendos and instead claims that Mr. Makkar complained on the basis that he was being passed over for promotion and at the same time accused Mr. Poot of being power hungry and seeking the Commissioner's job. Mr. Poot claims never to have made a public apology but stated that he approached Mr. Makkar a few days after the meeting and suggested that they "forget" their differences and work together in the future. Mr. Makkar denies that this occurred.

Mr. Easton, the Commissioner of Planning at the time, was present at the meeting and testified to this Board of Inquiry on behalf of the Commission. He has only a vague recollection of the events. He recalls an incident occurring between Mr. Makkar and Mr. Poot at that time, but could not recall if it was over what he described as a "personal" or a "professional" dispute. Mr. Easton says he did not pay much attention to it at the time and considered it as an "emotional thing", yet "quite nasty." Mr. Easton also considered it normal for his staff to be involved in what he described as "internal turmoil" because of the pressures upon them. Mr. Easton also said that he would be surprised at any allegation of discrimination against Mr. Poot because of Mr. Easton's knowledge of Mr. Poot as an individual and his belief in Mr. Poot's integrity. No party called any other witness to testify about these incidents. When called to give evidence in reply, Mr. Makkar did produce a handwritten memo that he had prepared just after the luncheon meeting in 1973 regarding his complaint against Mr. Poot's conduct. The memo confirms that Mr. Makkar lodged an "informal complaint" with the Assistant Personnel Commissioner in late August of 1973 and that the meeting convened the following day. . . However, the memo does not specify what type of behaviour Mr. Makkar was protesting.

In any event, by November of 1974, Mr. Makkar gained a promotion to the position of Senior Planner. Mr. Poot admits that even then, he did not consider Mr. Makkar was performing at the level of Senior Planner. But, in spite of this, the promotion was granted. Mr. Easton was content with Mr. Makkar's work. Mr. Easton testified, "As far as I was concerned, he was a professional, doing his job well." Upon his promotion, Mr. Makkar was transferred to another section of the department and his work was no longer under the supervision or direct scrutiny of Mr. Poot.

The position of Senior Planner is a very important one within the City's Planning Department. The primary function of a Senior Planner is to prepare the analysis and presentation of professional planning reports and documents that are necessary to provide technical and professional advice to the City's Planning Board, Committee of Adjustment and/or Council. This facilitates the decision-making process and the development of the City in accordance with the City's planning objectives. To this end, the Senior Planner's major responsibilities include the development and recommendation of planning policies and negotiating with developers and other applicants on behalf of the City in order to achieve the City's planning objectives. The Senior Planner is also called upon to represent the City in presentations to and communications with the general public, the development industry, and agencies of local and senior levels of government. This involves maintaining direct contact with the elected representatives of the City and the appointed members of the Planning Board and the Committee of Adjustment. They also assist the Manager and the Director of the Department in the initiation of and carrying out of research to provide the basis for the formulation of long-range policies for the City. These are all functions which Mr. Makkar was called upon to fulfil on a daily basis.

In 1979, Mr. Weir was appointed as Mr. Makkar's direct supervisor or manager. Mr. Makkar continued to work as a Senior Planner in the Development Application section for some time without incident or turmoil. Mr. Poot, in turn, was rising in the department's hierarchy and by this time was the Director of the Plan Review Division.

In 1979, Commissioner Easton was given a lateral transfer within the City to a position of Commissioner of Research. This transfer was the direct result of two reports

issued in 1974 and 1979 criticizing the upper management and the reputation of the City's Planning Department. For a short period, Mr. Poot was the Acting Commissioner until Kenneth Whitwell was chosen as the Commissioner of Planning in 1980. Upon Mr. Whitwell's appointment, Mr. Poot ultimately became the Deputy Commissioner and Director of Development Review and Administration.

A great deal of testimony centered upon the impact of Mr. Whitwell's arrival upon the Planning Department as a whole and upon the individual employees within that department. One thing was clear from the evidence and Mr. Whitwell's testimony. Mr. Whitwell took on the responsibilities of Commissioner at the age of forty. He is a young, intelligent and ambitious person who saw his mandate as including the transforming of Scarborough's Planning Department from one suffering from a poor reputation into one of the best in the country. It must be concluded that Mr. Whitwell was anxious to achieve this goal and considered that it should happen as soon as possible. He had very little patience with anyone who could not meet his very high standards of performance. With only one exception, all the witnesses for all the parties described Mr. Whitwell's assumption of responsibilities as having a dramatic impact upon the Department. Planners were expected to produce more reports and of a far higher quality than was accepted under Commissioner Easton's leadership. Reports of the kind that had been acceptable under Commissioner Easton were rejected by Commissioner Whitwell. Mr. Brian Carney, who was terminated by Commissioner Whitwell at age 47 with significant seniority with the City, described the changeover as creating an atmosphere of "anxiety.... At times frenzy, crept into the operations." This is confirmed by Joyce Trimmer, a City Councillor called by the Commission to testify. She described receiving complaints from Planning staff saying that they felt they were being closely watched

and monitored. Mr. Poot described the difference between the Easton and Whitwell regimes as the difference between "academic or ivory tower" versus "pragmatic". Lorne Ross, a department manager, described the difference as "night and day." In approach, the two Commissioners differed in terms of the style and the substance of reports required of their Planners. Also, Commissioner Whitwell demanded a far greater participation of the Planners in consultations and negotiations with politicians, developers and residents than Commissioner Easton had encouraged or expected.

With the sole exception of Mr. Makkar, all witnesses for all parties confirmed the differences between the working life under the two Commissioners. He testified that any change was more one of style than of substance. But Mr. Makkar also disputed the testimony about the Department's problems under Mr. Easton. Mr. Makkar recalls no communications being made to him or the department initially about changed expectations and recalls no reactions to the changeovers. This may well have been the result of Commissioner Whitwell's approach of drilling into his managerial staff the requirement to improve and placing on the managers the responsibility of bringing their staff up to the new Commissioner's expectations. Thus, little, if any, direct communication went from Mr. Whitwell to the Planners or Senior Planners about the new scheme of things. Yet it seems that all the witnesses except Mr. Makkar felt the impact of tremendous new pressures upon them when Mr. Whitwell took charge as a result of his different approach.

However, there is no doubt that Mr. Makkar's employment situation changed radically soon after Mr. Whitwell's appointment. Up to that time, Mr. Makkar had enjoyed a relatively stable and successful career with the City's Planning Department. Aside from the 1973 incident, his career had developed without difficulty. Mr. Makkar had

received no criticism of his work and was highly regarded by Commissioner Easton. There is no evidence to suggest that Mr. Makkar's work was anything other than satisfactory. It also appears that he enjoyed his work and was extremely hard working and dedicated to his position.

But things began to change in 1981. In February of 1981, Mr. Makkar was working under the direct supervision of Murray Weir. Mr. Poot had a supervisory position over Mr. Weir and was thus indirectly supervising Mr. Makkar again. On February 4, 1981, Mr. Poot sent Mr. Makkar a very critical memorandum regarding a report authored by Mr. Makkar. The memo criticizes Mr. Makkar's grammar, logic and "poor definition of the problems in issue" in the case. It offered specific criticisms of the contents of Mr. Makkar's report regarding, consistency, style and "economy of expression", "completeness of analysis" and "lack of supporting rationale for the conclusions offered". The memo states that the report is "not of the quality to be expected from a Senior Planner or a Planner". It concludes, "Unless you can produce reports of an adequate standard in the future, I will have to recommend that you be reclassified to a lower position." Copies of the memo were sent to the Commissioner and to Mr. Weir. The memo was delivered to Mr. Makkar without any prior or subsequent discussion by Mr. Poot.

Mr. Makkar was shocked to receive this memo. He had never received anything like it in his many years in the Department. He felt his career and position had been threatened. He also wondered why Mr. Poot would be criticizing a draft that Mr. Makkar had only intended for Mr. Weir's review. Mr. Makkar responded within a few days with a reply memorandum to Mr. Poot. Mr. Makkar accused Mr. Poot of "crippling" Mr. Makkar's potential for improvement because of "threats and intimidation."

Mr. Makkar wrote that, "The net effect of this... is tantamount to a notice of dismissal." Mr. Makkar continued by accusing Mr. Poot of being on a "witch hunt" and being motivated by "bias". Mr. Makkar also pointed out instances of errors in other Planners' reports that he claimed should have inspired similar critiques by Mr. Poot if he were treating all employees equally. Finally, Mr. Makkar protested the unfairness of the criticism in general and he says that Mr. Poot was reacting to a "first draft" of a report which would, in the normal course, have undergone revisions with his manager, Mr. Weir, before being placed before the Deputy Commissioner or Commissioner himself. It appears, however, that this was not a first draft because Mr. Makkar offered another draft of the same report in cross-examination. Nevertheless, Mr. Makkar felt that the draft had not been in a condition to submit to Mr. Poot or Commissioner Whitwell and resented the fact that it had come to their attention prematurely and had been criticized as if it were a later draft. An explanation for this was offered by Mr. Weir. He testified that he had had to spend proportionately more time with Mr. Makkar reviewing reports to bring them up to Mr. Whitwell's expectations than was necessary for other Planners or Senior Planners. But enough improvement had not occurred. Thus, Mr. Weir had shown this particular draft report to Mr. Poot and it was decided that Mr. Poot would put his critique in writing so that Mr. Makkar could clearly understand the problems and concerns of management over his reports.

In any event, Mr. Makkar felt very threatened when he received Mr. Poot's memorandum. After sending his reply, Mr. Makkar tried to discuss this with Mr. Weir, but was referred to Mr. Poot. Rather than speak to Mr. Poot, Mr. Makkar went to Commissioner Whitwell directly. Mr. Makkar claims that Commissioner Whitwell would not discuss the matter directly. But Commissioner Whitwell sent

a memo responding to Mr. Makkar's reply to Mr. Poot which further criticized Mr. Makkar's report. Commissioner Whitwell's memo says that Mr. Poot had been instructed to bring about improvement in reports through specific criticisms and that this was all that being done throughout the Department. Commissioner Whitwell denies any bias in the treatment of Mr. Makkar and denied that Mr. Poot's memo should be read as a threat or notice of dismissal. Mr. Whitwell concluded his memo by saying, "We can all improve our work and I would not approve of any Planner who refused to do so."

In discussions over this exchange of memos, Mr. Poot testified that he mentioned to Commissioner Whitwell that there had been an incident in the 1970's between Mr. Poot and Mr. Makkar in which there had been allegations of racial discrimination. Thus, at that point, Commissioner Whitwell was at least alerted to the history of the unpleasant dealings between the two men.

After Mr. Whitwell's memo, the internal controversy over the report died down because, for entirely unrelated reasons, the application which was the subject matter of the report was withdrawn.

The initial memo and the responses have been repeated here in considerable detail because they set out the themes and tones of the rest of the employment relationship between Mr. Makkar and the managerial staff at the City until his termination. In a nutshell, in most cases when Mr. Makkar was criticized it was done in the form of a memorandum with little or no verbal communication before or after the memo was delivered. The criticisms are usually dismissed and considered to be unfounded by Mr. Makkar and he also accused Mr. Poot and others of being biased and motivated by a desire to harass and intimidate him until he resigned or was fired.

Notwithstanding all this, in July of 1981, Mr. Poot assigned Mr. Makkar the responsibility of co-ordinating the Planning staff for the front counter of the Department. The Department was having difficulties in this area and Mr. Makkar was asked not only to take over the responsibility for staffing, but also to develop recommendations for what should be done on a permanent basis. It is clear that Mr. Makkar was also expected to continue with his normal caseload and responsibilities as a Senior Planner at this time. Mr. Poot acknowledged in memoranda and in his testimony that Mr. Makkar had performed this job well and that in the end, the Department successfully followed Mr. Makkar's recommendations for the counter area.

After the 1981 exchange of memoranda occurred, there is no documented concern over Mr. Makkar's performance until February 1982. Mr. Weir then wrote a critical memorandum to Mr. Makkar on February 18th regarding a report concerning Turbania Avenue. The Turbania Avenue report was criticized by Mr. Weir in his memorandum and called for three specific revisions. The memo repeats the theme from Mr. Poot's 1981 critique and says Mr. Makkar's work was not at the level "expected of a Senior Planner". It concludes, "Both the Director [Poot] and I cannot continually devote the amount of time to you as required in this instance without sacrificing our time in relation to more junior members of staff." The memo made it clear that improvements were expected of Mr. Makkar. Mr. Makkar denies that Mr. Weir was spending extra time on him or his reports. He regarded Mr. Weir's criticisms as unfounded, both in substance and style, because Mr. Makkar considered Mr. Weir's planning opinion on the Turbania Avenue issue was incorrect. It is clear that Mr. Makkar's view of the planning issue for the site was ultimately the one that prevailed. But as Mr. Poot explained, while Mr. Makkar was correct in his views of what should happen on the site, the criticisms had been leveled

over his handling of the matter with another department and the contents of the report itself. In any event, Mr. Makkar believes that Mr. Weir was directed to write the memo by Mr. Poot because there had been nothing like it for the past year.

One day after the Turbania Avenue memo, Mr. Makkar received another critical memo from Mr. Poot regarding a by-law amendment on Bonniewood Road. Mr. Poot's memo praised the intention of Mr. Makkar's draft, yet pointed out a technical, but important omission in the proposed amendment to the by-law. Mr. Poot wrote, "I expect Senior Planners to control details of this nature without the need for further checking by more senior staff." A copy of this memo was sent to the Director in charge of by-laws who had also overlooked the error in Mr. Makkar's proposal. That Director was not criticized by Mr. Poot for failing to notice the omission. Mr. Makkar considers this as a blatant example of the disparate treatment he received from Mr. Poot and the City.

On June 1, 1982, Mr. Weir was transferred to the Urban Design Department and demoted from his managerial role with his own consent. Commissioner Whitwell had not been satisfied with Mr. Weir's ability to "encourage staff" and laid part of the blame for Mr. Makkar's performance on Mr. Weir up to that point. At the time of Mr. Weir's transfer, Mr. Poot was the Director of the Development Review Division. So until Mr. Weir was replaced permanently, Mr. Poot became Mr. Makkar's direct supervisor except for a two-month period when Ann McCauley, another Senior Planner, acted as Mr. Makkar's supervisor.

On June 13, 1982, even though Mr. Weir was no longer supervising Mr. Makkar, Mr. Weir delivered a performance appraisal dealing with Mr. Makkar's performance over the previous year. This is the first example we saw of the

Performance Appraisal System that had been instituted by the City in early 1981 and it was theoretically designed to assist employees in the setting and attainment of employment goals each year. The stated purpose of the Performance Appraisal Programme was to ensure that all staff members understood the nature of the tasks they were expected to perform and the results expected from their completion. The programme was also designed, inter alia, to ensure acceptable performance levels for all tasks, provide information for establishing appropriate training and development programmes, to allow for efficient manpower planning and development and to provide input for effective decision-making regarding promotion.

Mr. Weir's performance appraisal of Mr. Makkar stated that there had been a continual need for revisions of Mr. Makkar's reports since the report mentioned above that was the subject of the first critical memorandum by Mr. Foot in February of 1981. Mr. Weir wrote, "While the major problem is still your ability to clearly and precisely express your thoughts in a logical fashion, some difficulty is also being expressed in structuring your reports from a graphic and sequential viewpoint." Mr. Weir commented that he had a "rather pessimistic view of [Mr. Makkar's] future in the department" as a result of the work performance to date. The report also indicated that Mr. Weir expected Mr. Makkar to function with minimal supervision in the future. Mr. Weir continued by promising to assist Mr. Makkar in "your efforts to improve" but commented that this must be done after hours to avoid "shortchanging" other staff. Mr. Weir offered Mr. Makkar help in setting up work priorities and demanded that reports be prepared, in draft form at least, ten days or two weeks prior to agendas scheduled to be heard by the Planning Board or the Council in order that there was sufficient time to implement revisions.

Mr. Makkar's testimony denied that Mr. Weir and Mr. Poot were in fact spending extra time with him to upgrade his reports. He further denied that Mr. Weir had ever been critical of the style of his reports before this memorandum. He says that Mr. Weir refused to discuss the memo with him, whereas Mr. Weir testified that Mr. Makkar had displayed a "positive attitude" towards the memorandum when they discussed it in the meeting in which it was delivered. But in any case, Mr. Makkar was so distressed by the receipt of this memorandum that he sought the assistance of a lawyer because he thought he was being "set up" for termination.

Mr. Makkar retained the services of Gordon Lewchuk to act as his lawyer. Mr. Makkar felt that his employment and career were in jeopardy and that he needed legal assistance. Mr. Lewchuk wrote to Mr. Weir by June 30 demanding "particulars" of the criticisms contained in the performance appraisal. While Mr. Weir testified that he personally felt that Mr. Lewchuk's letter deserved a response, Mr. Weir was instructed by Commissioner Whitwell to respond with a letter that would discourage Lewchuk's further involvement because Commissioner Whitwell felt that the involvement of a lawyer was entirely inappropriate in these circumstances. Thus, in mid June, Mr. Weir responded to Mr. Lewchuk stating that the matter was to be treated as "internal" and giving no direct response to Mr. Lewchuk's request for particulars of the criticisms.

Around the same time, on July 16, 1982, Mr. Poot wrote another critical memo to Mr. Makkar regarding an oral presentation that he had given to the Planning Board regarding Woburn Plaza and St. Mark's church. This memo praised Mr. Makkar as being "very comprehensive" but criticizes the presentation for failing to be "very concise or logically organized." The memo concluded, "You should seriously look into ways in which you might improve your

performance. You may wish to seek some outside help in this area." No internal help was offered. Mr. Makkar appeared to respond well to this memorandum. He wrote a memo thanking Mr. Poot for his "comments suggesting improvements." Yet Mr. Makkar admitted in cross-examination that he had dismissed the critical parts of Mr. Poot's memo by saying, "I didn't take it very seriously." This may partly be because Mr. Makkar received a warm letter of thanks from the Co-Chairman of the Board of St. Mark's Church for his "interest, suggestions and support" of the plans of the congregation.

Mr. Makkar did not seek the "outside help" in making presentations as suggested by Mr. Poot. Nor was any internal assistance offered by the Department until 1983 when Lorne Ross instituted a system of "mock presentations" for all Planners and Senior Planners to help bring about a general improvement of presentations to the Planning Board and Council. Mr. Makkar participated in this programme to the same extent as the rest of the Department.

Meanwhile, in July of 1982, Mr. Lewchuk wrote again demanding particulars of the criticisms in Mr. Weir's appraisal and Mr. Poot's July 16th memorandum. This was responded to by the City's lawyers suggesting that Mr. Makkar invoke the City's appeal procedure of the appraisal if he is still concerned. The particulars that were requested were not supplied.

In August of 1982, Mr. Weir had still not been replaced. Another Senior Planner, Anne McCauley, was acting as Mr. Makkar's immediate supervisor. But they were both directly supervised by Mr Poot. Towards the end of the month, Mrs. McCauley wrote a note to Mr. Makkar regarding what we shall refer to as the "Riviera Report". Mrs. McCauley admits that she would not normally have communicated in writing with Mr. Makkar but she wrote the

note while Mr. Makkar was on vacation and she was planning to be away herself when Mr. Makkar returned. So she had no alternative but to communicate through the memorandum. Her memorandum specifies concerns with Mr. Makkar's draft of the Riviera Report and indicates that she has made extensive changes to Mr. Makkar's draft as well as drafting the necessary accompanying by-law herself for him. She raises two substantive planning issues and told Mr. Makkar that his report "lacked logical argument." The evidence discloses that Mr. Poot and Commissioner Whitwell also made extensive revisions to the draft of the Riviera Report. Ultimately, a version of it was approved by Commissioner Whitwell and presented by Mr. Makkar to the Planning Board.

After the presentation, Mr. Poot wrote to Mr. Makkar criticizing both the report and the presentation and sent copies of this to Commissioner Whitwell, Mrs. McCauley, Mr. Ross, the Director of Administration and "the file". The presentation was faulted for being too long in detail and having answers that were not responsive to questions. The report was faulted for its graphics and contents of arguments. Mr. Makkar feels particularly grieved by the criticisms of this report. Firstly, he pointed out that the report had already been approved by Commissioner Whitwell so it would be unfair to regard it as inadequate. Further, Mr. Makkar says that his problems in the presentation were a direct result of Commissioner Whitwell interrupting him during the presentation by whispering in his ear while questions were being addressed. Mr. Makkar claims that this memo, like all the others he received, was designed to threaten and harass him. Yet it is also clear that the presentation did cause concerns because there is reference to some concerns in the minutes of a management meeting held shortly thereafter.

On August 24, 1982, Mr. Poot wrote another critical memo to Mr. Makkar regarding a telephone conversation he had had with Ontario Hydro. It is clear that there was a communication problem between the person Mr. Makkar contacted at Mr. Poot's request and Mr. Makkar. This resulted in Mr. Poot being contacted by Ontario Hydro and Mr. Poot then being prompted to write to Mr. Makkar about this. However, Mr. Poot never discussed this with Mr. Makkar or attempted to clarify or understand the problem. Mr. Makkar described this memo as being written "simply for the sake of criticizing" him.

In early September of 1982, Lorne Ross was promoted to Director of Development Applications as the replacement for Murray Weir. Mr. Ross then became Mr. Makkar's immediate supervisor. Mr. Makkar testified about his recall of an incident that disturbed him early in his relationship with Mr. Ross. Mr. Makkar says that his religion came up in conversation about the recent shooting in Osgoode Hall during a trial involving Sikhs. Mr. Makkar says that Mr. Ross said to him, "Are Sikhs not troublemakers?" Mr. Ross categorically denies making such a comment or having such a conversation. While Mr. Ross credits Mr. Makkar with having sincere beliefs about the allegations he has made in this case, Mr. Ross believes that this particular allegation was "made up." Mr. Makkar said that the comment concerned him and convinced him that Mr. Ross was prejudiced. But Mr. Makkar said that their relationship was "relatively normal" for the first year and attributed this to the claim that he worked quite independently of Mr. Ross. On the other hand, Mr. Ross testified that he had to spend a lot of time on Mr. Makkar's work. But he stressed that he began his assignments with no preconceived notions. Mr. Ross says that he deliberately did not want to know any background or have any access to the files of the Planners he was assigned to

supervise because he wanted to make his own independent judgment of each person. So he was unaware of the history of correspondence between Mr. Makkar and Mr. Poot and Mr. Weir. This was confirmed by Commissioner Whitwell.

As a carryover from his direct supervision of Mr. Makkar, Mr. Poot also criticized Mr. Makkar for his delay in responding to a matter dealing with Kenworthy Avenue. The delay allegedly cost the City potential revenue. The evidence is clear that the file had originally been the responsibility of Ann McCauley. She had not dealt with the file for close to two months when she reassigned it to Mr. Makkar. At that time she was in an acting supervisory role over Mr. Makkar. Neither of them had assigned any great priority to the item and so it was not dealt with within a time frame acceptable to Mr. Poot. Mr. Poot sent critical memos to both Mrs. McCauley and Mr. Makkar over the issue. Mr. Makkar's memo was far more severe. In cross-examination, Mr. Poot acknowledged that Mrs. McCauley was more to blame for the delay than Mr. Makkar but that the memos do not reflect that. Mr. Poot explained this by saying that Mr. Makkar's memo was written in the context of the difficulties management were already having with him as opposed to Mrs. McCauley.

On September 21, 1982, Mr. Lewchuk responded to the City Solicitor's letter reiterating the demand for particulars of all the critical memos that had been sent to Mr. Makkar and accusing the department of a course of "planned harassment and intimidation." This was immediately followed by a memo from Mr. Makkar to Mr. Poot sent in response to the written criticisms regarding Ontario Hydro, "Riviera" and Kenworthy Avenue. Mr. Makkar's memo accurately pointed out several factual and technical errors in Mr. Poot's criticism of him. But, it must also be said that Mr. Makkar did not address any of the substantive areas of

Mr. Poot's concern. However, Mr. Makkar's memo accuses Mr. Poot of a "confused state of mind" and of harbouring the motivation of

...some kind of personal vendetta ... solely with the purpose of discrediting and harassing me. It appears that a hurried attempt is being made to ruin my excellent record of 15 years in the department with some ulterior motives and designs beyond my imagination.

Mr. Makkar requested that the critical memos be stopped. He sent copies of this memo to Commissioner Whitwell, Mr. Ross and the Director of Administration, who are the same three who had been sent copies of Mr. Poot's memos.

Mr. Makkar's memo was answered within days by a further memorandum from Mr. Poot correcting his own errors and adding:

I assure you that my intention in communicating my concerns with your performance is to ensure that you understand those concerns and the reasons for them. I hoped that communicating these concerns to you in writing would help you to act on them and bring your performance up to the level to be expected of a senior planner by the department.

On October 13, 1982, Mr. Poot delivered his performance appraisal of Mr. Makkar dealing with the previous year. A meeting was held in which this appraisal was delivered. Also in attendance was Mr. Ross. The comments of Mr. Poot should be quoted in full:

RESULTS ACHIEVED

1. Man has considerable difficulty producing reports that clearly evaluate the planning issue and that logically argue for a concise and implementable recommendation. He requires large amounts of consultation and supervision and takes longer than other

senior planners to complete the work assigned.

2. Man's negotiations with other departments, agencies, and applicants from time to time result in apparent misunderstandings.
3. Man is still learning to write effective zoning by-laws and Official Plan texts in relation to the applications he deals with. He therefore requires substantial help and consultation.
4. Man has represented the Borough at a number of Ontario Municipal Board hearings.
5. Man has managed the staffing of the Planning Department counter with planning staff on a rotating basis. He recommended that the counter be staffed with a full-time planning technician. The recommendation has now been implemented.

EVALUATION: ABILITY TO ACCOMPLISH DEPARTMENTAL/
BOROUGH GOALS THROUGH OTHERS

Man needs to improve his communication skills to ensure that others understand him correctly, particularly when communicating with other departments and applicants.

SUPERVISOR'S COMMENTS

Man consistently researches his assignments with great diligence and is well motivated. He needs to seriously improve his work through the following measures:

1. Set himself daily production targets and continue to keep a running list of jobs to be completed to improve work output and completion.
2. Adopt a more organized approach to problem solving and report writing to improve his ability to work with a minimum of supervision.
3. Review his own reports and letters rigorously to eliminate grammatical, stylistic and factual problems and to improve the quality of his written work.

4. Improve his verbal communications to avoid misunderstandings by others and to improve presentations to the Planning Board.

CAREER PLANNING

Man is having serious difficulties meeting the Department's expectations of a Senior Planner.

Mr. Makkar regarded this appraisal as "unfounded" and "not true" and as part of the plan to discredit him that was spearheaded by Mr. Poot. Mr. Poot said the appraisal was written in compliance with the objectives of the City's and department's appraisal programme by pointing out both the positive and the negative aspects of Mr. Makkar's work over the previous year.

There is some dispute over what occurred at the meeting when Mr. Makkar received this appraisal. Mr. Makkar claims that he kept demanding particulars of the criticism and that they were not offered. The stated purpose of the meeting was supposed to have been to consider the appraisal as draft in form and to have Mr. Poot and Mr. Makkar review it to enable Mr. Makkar to have input into the draft. Mr. Poot claims that Mr. Makkar's reaction was "violent" and "angry" and "with hands flying" and very "upset". Yet Lorne Ross described Mr. Makkar's demeanour as "calm ... direct [and] obviously very concerned". It is difficult to reconcile these two views. Mr. Ross's description is far more in conformity with the behaviour one would expect of Mr. Makkar, given his demeanour during these very trying proceedings and given other people's assessment of Mr. Makkar. It must be concluded that Mr. Poot was either fabricating, exaggerating or choosing inappropriate words to describe Mr. Makkar's admitted grave concern over the contents of that appraisal. I accept Mr. Ross's comments as being more accurate. Mr. Ross went on to testify that after Mr. Poot left the meeting, Mr. Makkar told Mr. Ross that Poot

was "out to get" Mr. Makkar. Mr. Ross testified that he then assured Mr. Makkar that he [Ross] had no intention of being Mr. Poot's "hatchet man" and that Mr. Ross wanted to work with Mr. Makkar to help him improve. Mr. Makkar denies that such a conversation ever took place. Yet again, I must prefer Mr. Ross's recollection and accept that the conversation transpired as Mr. Ross alleges.

The issue of this appraisal prompted Commissioner Whitwell to convene a meeting with Mr. Makkar on October 22, 1982. Mr. Whitwell said he wanted to talk "off the record" with Mr. Makkar to help him achieve the goals of the department and open up lines of communication by stressing that the Commissioner's own door "is always open". Commissioner Whitwell says he was also concerned because he was receiving complaints from the Union about persons on the unionized staff in the department feeling the pressures of work due to the new demands upon them. Mr. Makkar conceded that he got the impression from Commissioner Whitwell that he sincerely wanted to resolve the issues that were brewing. Again, there is dispute over the exact contents of the meeting, but what the two men agree upon is that Commissioner Whitwell assured Mr. Makkar that there was no plot to have him fired. Also, Commissioner Whitwell tried to convince Mr. Makkar to deal with the department without the intervention of a lawyer.

Mr. Makkar considered Commissioner Whitwell's comments very seriously. However, on October 25, Mr. Lewchuk wrote to Mr. Whitwell stating that the differences between Mr. Makkar and the department could not be resolved without a lawyer unless three things were done. Those things were as follows:

1. Remove the October 13 appraisal and any previous critical memos from Mr. Makkar's personnel file.

2. Commissioner Whitwell should write a memo to the personnel file "confirming [Mr. Makkar's] high level of achievement."
3. The City should pay 100% of Mr. Makkar's legal fees to date.

Commissioner Whitwell described his own reaction to receiving this demand from Mr. Lewchuk as one of "shock" over the concept that anyone would suggest that a Commissioner simply overrule his manager's opinions. Commissioner Whitwell testified "the suggestion was so ludicrous that I didn't understand that anyone would be serious in suggesting such a thing." This prompted Commissioner Whitwell to believe that his attempts to deal directly with Mr. Makkar "had failed." However, it is to be noted that this was Commissioner Whitwell's first attempt at any sort of reconciliation. As a result of all of this, Mr. Poot's draft performance appraisal was submitted to Mr. Whitwell without any revisions and became the formal performance appraisal for that year for Mr. Makkar. However, a six-month review was then set up to be done by Mr. Ross.

At the end of October, Mr. Ross wrote a memo to Mr. Makkar and Mrs. McCauley outlining in some detail the expectations of the department regarding report writing. That memo was described by Mr. Makkar as "genuine" and of a helpful and constructive nature. It was certainly the first concrete articulation given to the Senior Planners of what was expected of them under Commissioner Whitwell, other than the comments contained in critical memos mentioned above.

It is clear from the evidence that management resented and disliked the fact that Mr. Makkar had been dealing with them through a lawyer. Management felt that its

dealings with Mr. Makkar were those simply of an employer to an employee and thus strictly internal and confidential in nature. Further, they felt that Mr. Makkar should be responding positively to the critical advice he was receiving, rather than treating the memos as steps in adversarial or litigation proceedings. So in early November of 1982, Commissioner Whitwell wrote to Mr. Lewchuk telling him that City was invoking the internal appeal process for performance appraisals to enable Mr. Makkar to challenge Mr. Poot's October 1982 appraisal according to the City's own policy. Commissioner Whitwell commented to Mr. Lewchuk that the City did not expect to correspond with him again and concluded, "Your involvement in this matter has unfortunately proven to be an impediment to establishing positive communications with Mr. Makkar."

This did not deter Mr. Lewchuk. He wrote a detailed objection to Mr. Poot's appraisal addressed to Commissioner Whitwell and calling for the establishment of a re-evaluation committee under the performance appraisal programme. Mr. Lewchuk also suggested "... Possibly the difficulties in the dispute lie in that the department's expectation of the Senior Planner may have changed without notification to Mr. Makkar."

After the flurry of documentation in the fall of 1982, there is a relative lull in the fray. Nothing of note occurred until early 1983. In February of 1983, Mr. Ross met separately with Mr. Makkar and Ann McCauley to try to come up with an agreement about the goals and expectations that would be set out in their forthcoming performance appraisals. Mr. Ross expected a great deal of his Senior Planners. But both Mr. Makkar and Mrs. McCauley were reluctant to agree to the definition of goals which had been suggested by Mr. Ross and which they felt were unrealistic to be able to achieve. For example, Mr. Ross had asked that they agree to a standard

whereby they be able to submit draft reports to him that required no revision. Mr. Ross repeatedly asked Mr. Makkar to respond to the suggested goals in writing, and Mr. Makkar kept telling him that he was considering it under the advice of his lawyer. Ultimately, Mr. Makkar told Mr. Ross that he would not be participating at all in the appraisal programme and would therefore not co-operate in the drafting or setting of goals.

Also in February of 1983, Mr. Makkar was asked by Mr. Poot to attend an evening meeting of residents at Lord Roberts Public School. The meeting concerned the plans for some Hydro lands that were causing a great deal of anxiety for the local residents. The matter was Mr. Ross's file and responsibility. But apparently he could not attend and Mr. Makkar was asked to substitute for Mr. Ross at the last minute. I accept Mr. Makkar's evidence that he got little or no briefing on the situation and insufficient time to prepare for the meeting. It appears he was called upon to make a presentation for the department and did not acquit himself in a way that did the department credit. His performance prompted the City's Administrative Co-ordinator to write a memo to Commissioner Whitwell complaining about Mr. Makkar's presentation. Mr. Poot was present at the same meeting and said that he had had to step in because Mr. Makkar was giving his presentation as if he was addressing a group of professional planners, rather than concerned citizens. Both Mr. Ross and Mr. Poot claimed that, as a Senior Planner, Mr. Makkar should have been able to handle or finesse such a situation even on such short notice. On the other hand, on the basis of the evidence presented to this Board of Inquiry, it is impossible to accept that Mr. Ross's and Mr. Poot's claim is fair. This is especially so because the matter had not been Mr. Makkar's responsibility and it was not a situation that was familiar to him. Further, Mr. Poot never discussed this with Mr. Makkar after the fact to seek an

explanation nor did Mr. Poot give any suggestions for future improvement. Yet Mr. Poot wrote a critical memo recording Mr. Makkar's poor performance. This memo was put into Mr. Makkar's file together with the memo from the Director of Administration. But neither memo was ever sent to Mr. Makkar. Mr. Poot said that his reasons for doing this was that he had been advised by Commissioner Whitwell and the Commissioner of Personnel not to send so many critical memos to Mr. Makkar because they were eliciting negative reactions. The memo then became a part of Mr. Makkar's employment record and was available for consideration in the ultimate decision regarding his dismissal. Yet Mr. Makkar was never made aware of the memo until after these proceedings were launched.

It was finally agreed by all concerned that a Re-evaluation Committee under the Performance Appraisal system would meet with Mr. Makkar and Mr. Lewchuk to consider Mr. Poot's August 1982 appraisal. This meeting was held on June 10, 1983. The Committee consisted of the Commissioners of Planning and Personnel, Mr. Whitwell and Ms. Jacqueline Griffin. Again, there is dispute over the details of what occurred at that meeting. But several things can be concluded from the evidence. First and foremost, all parties left the meeting with a positive and optimistic outlook for the future. Mr. Makkar was so pleased that he discharged Mr. Lewchuk after the meeting because Mr. Makkar felt he no longer needed a lawyer's assistance. Also, Mr. Makkar was buoyed by comments made by Mr. Poot that Mr. Makkar had improved over the past three months. The evidence suggests that Mr. Poot had even indicated that there had been "considerable improvements." It was also agreed that while Mr. Poot's appraisal would remain on the record, Mr. Makkar's file would also be supplied with all the memoranda he had sent since 1981, plus a memo from Commissioner Whitwell which would be drafted and which would clearly outline his expectations of the Senior Planner. Mr. Makkar also believes

that the file would have contained the details or particulars of all the criticisms; however there is dispute over whether that was the case or not.

In any event, Commissioner Whitwell wrote the memorandum outlining his expectations in detail and invited Mr. Makkar to speak to him formally or informally over any problems that could not be resolved with his Manager (Ross) or Director (Poot). Mr. Makkar indicated his agreement with the suggestions and objectives that had been set out in Mr. Whitwell's memorandum. But Mr. Makkar became concerned again in August 1983 when he received a memorandum which had been penned jointly by Commissioners Whitwell and Griffin which had been intended as a confirmation of the understandings reached at the Re-evaluation Committee meeting in June. Mr. Makkar felt that the memorandum was not accurate and did not fully reflect his own understanding of what had been agreed upon at that meeting. But no action was taken by Mr. Makkar over this concern because he soon became far more upset over a performance appraisal he received at about the same time from Mr. Ross in August 1983.

Mr. Ross's appraisal should be set out in detail.

CITY OF SCARBOROUGH
PLANNING DEPARTMENT

TO: Kenneth J. Whitwell DATE: August 26, 1983
FROM: Lorne Ross FILE:
RE: Performance Appraisal - Man Makkar, Senior
Planner September 1982 - August 1983

Mr. Makkar came under my direction in September of 1982 with my assumption of the duties of Manager, Development Applications for the South Scarborough Planning Area.

I have worked closely with Mr. Makkar throughout the last 12 months with the twin objectives of

assisting him in the completion of planning assignments and assisting his growth and development as a professional member of the Planning Department.

In furtherance of the first objective we have worked together on over a dozen applications-sites which have been reported to Planning Board (now Committee) and a similar number which have been withdrawn, held or which are still active.

In pursuit of the second objective I have endeavoured throughout the year to recognize work well done and to be constructive in my criticism whether delivered verbally, editorially on draft reports, or in memoranda form. In consultation with Mr. Makkar I prepared a Goals Statement in February 1983 to establish the performance criteria of a Senior Planner position.

Mr. Makkar has consistently demonstrated an energetic and positive attitude throughout the year; an attitude which is much to his credit in view of the performance appraisal which concluded his year prior to our working together.

Mr. Makkar has consistently and without reminders fulfilled his commitments to me for delivery of reports and bills.

Notwithstanding the energy and dedication shown, however, I am obliged by my review of the work performed over the last 12 months to conclude that Mr. Makkar has not performed at the level required of a Senior Planner.

The work which has culminated in Mr. Makkar's first draft reports has, in far too many instances, been below Senior Planner standards for logic, economy, style and command of the English language.

The Planning Board (now Committee) has requested few oral presentations of the reports prepared by Mr. Makkar. The two presentations that I have observed did not demonstrate the confidence, command of the topic and control of supporting audio-visual aids required of a Senior Planner.

In the last three months Mr. Makkar has demonstrated a willingness and ability to independently drive multi-party negotiations to successful conclusions; characteristics of the Senior Planner position which were not demonstrated in the preceding three quarters of the review period.

The consequence of Mr. Makkar's performance has been my assumption of the duties which a Senior Planner ought to have performed for report writing, public presentations and the direction of negotiations with respect to too large a number of his assignments.

In summation, therefore, Mr. Makkar has energetically and consistently demonstrated his commitment to performing his duties at the Senior Planner level but has not achieved that objective through the work produced in the preceding 12 months.

"Lorne Ross"
Manager of
Development Applications
South Planning Area

Mr. Makkar felt wery wronged, not only by the content of Mr. Ross's appraisal but also by the way it was delivered to him. Mr. Ross gave the appraisal to Mr. Makkar at the close of a working day on the Friday evening before he was to begin a week-long vacation with his family and celebrate his birthday. Mr. Makkar feels that this was a deliberate attempt to ruin his plans and to further humiliate him. He also considered the substance of the report to be false. In particular, he strongly denied the suggestion that Mr. Ross had spent excessive time reviewing and redrafting Mr. Makkar's reports or taking over his responsibilities. Further, he suggested that some of the criticisms were founded on petty, isolated incidents, such as one error made in an overhead projector's display on one presentation. Mr. Ross's testimony and an accompanying memo which was presented to Mr. Makkar with the appraisal make it clear that Mr. Ross was treating this appraisal as a "draft" at the time that he delivered it to Mr. Makkar. Mr. Ross sought input from Mr. Makkar and offered to review the reports upon which the appraisal was based with Mr. Makkar on several occasions. But by this time, Mr. Makkar doubted the sincerity of Mr. Ross and did not believe that the contents were

negotiable. Mr. Makkar had no recall of being shown or offered the opportunity to review the reports upon which the appraisal was based. But I must conclude that the offer was genuinely made to him on a number of occasions.

Mr. Makkar returned from his vacation with a lengthy memorandum responding to the draft appraisal. The memorandum is too lengthy to reproduce here. However, in essence it accuses Mr. Ross of being self-contradictory, "wrong in logic" and unfair in his criticism of style which was said to be a "personal matter". Mr. Makkar responded to Mr. Ross's criticism alleging a lack of command of the English language by suggesting it was merely an "accent problem" and suggesting that Mr. Ross's comments constituted a "form of discrimination contrary to basic human rights." As he had done many times before, Mr. Makkar asked for specifics of the instances when he has failed to live up to the standards. Again, Mr. Makkar accused Mr. Ross of planning to spoil his vacation because of the timing of the delivery of the appraisal. Mr. Makkar also pointed out, "It is humanly impossible for anyone to work at any level to improve under extreme stress, strain, harassment, intimidation and fear... With this I conclude my appraisal is well planned with ulterior motives."

Mr. Makkar sent a copy of his response to Mr. Ross's draft appraisal as well as the draft itself to the Board of Control, the Members of the City Council and the Commissioner of Personnel. Mr. Makkar explained that he took this course of action because at that point he felt it was obvious that he was at the end of his career in the department and that he was contemplating going to the Human Rights Commission for advice. However, he felt that he should publicize his plight to the Board of Control and Council before going to the Human Rights Commission. On the other hand, Mr. Ross says he was shocked and dismayed by Mr. Makkar's type of response to the appraisal. Mr. Ross testified, "I was shocked that we could

have such a different perception of the reality we had both experienced for the last year.... It certainly severed, at that point, I think the ability of Mr. Makkar and I to continue on a confidential basis, as I had begun this process and was working towards a common understanding of what we had done together for the preceding year." In other words, it is clear that Mr. Makkar's reaction in "going public" and failing to address Mr. Ross's substantial concerns virtually terminated a positive working relationship or the possibility of such with Mr. Ross.

Mr. Makkar clearly believed at that point that Mr. Ross would not entertain any meaningful suggestions for change in the draft appraisal and that his only hope was to expose the situation to public scrutiny.

In September of 1983, Commissioner Whitwell was out of the country on vacation. Mr. Poot had taken over command as the Acting Commissioner. Since the Board of Control had been brought into the matter by Mr. Makkar and because Mr. Poot felt that the employment relationship could no longer continue, the Board of Control found itself considering the matter. At that point Mr. Poot would have been content to have Mr. Makkar terminated. But the Board of Control refused to deal with the matter in the absence of the Commissioner and asked the Commissioner to report back to them on the situation.

In the meantime, Mr. Ross had requested repeatedly in writing and verbally that Mr. Makkar meet with him to discuss the draft appraisal and review the reports upon which the appraisal was based. Mr. Makkar did not pick up on the offer. Mr. Ross clearly felt that Mr. Makkar's decision to "go public" by sending it on to the Board of Control was essentially the declining of the offer to review the report. Mr. Ross accordingly sent the contents on to Commissioner

Whitwell as the formal six-month appraisal. It should also be noted that Mr. Ross offered to produce to this Board of Inquiry the reports upon which he had based the appraisal. However, neither counsel for the Commission nor Mr. Makkar pursued this offer.

Mr. Ross was questioned extremely thoroughly about the amount of time he actually had to spend on Mr. Makkar's reports. Mr. Ross testified that he spent an "inordinate amount of time reading, editing and rewriting Mr. Makkar's reports", even during Mr. Ross's own time at home. Mr. Ross felt this time was "excessive" and beyond the realm expected for a Senior Planner. While Mr. Ross credits Mr. Makkar with having a positive reaction to the efforts that were spent, Mr. Ross failed to note any improvements. Mr. Ross was the only witness who offered Mr. Makkar specific incidents or particulars to back up the criticisms at the time and the only one who offered them to this Board of Inquiry. Yet Mr. Makkar does not recall the offers and still considers Mr. Ross was simply being directed by Mr. Poot and others to fire him or build up a case for termination.

One can well imagine that the working relationship between the principal parties and Mr. Makkar was very strained after these events. Yet, it appears that they continued to work together much as before. No further critical memos were issued despite the fact that Mr. Ross says he continued to have to spend a great deal of time revising Mr. Makkar's reports.

On February 10, 1984, a meeting was held by Commissioners Whitwell and Griffin, with Messrs. Makkar, Lewchuk, Ross and Poot present. At Mr. Makkar's and Lewchuk's insistence and expense, a certified court reporter was also present to transcribe these proceedings. That transcript became an exhibit in this case. The presence of

the transcript eliminates any controversy over what took place at this meeting. The transcript revealed that Mr. Lewchuk and Mr. Makkar had a different understanding of the purpose of the meeting than did the City's representatives. Messrs. Makkar and Lewchuk thought they were appearing before a re-evaluation committee constituted to review Mr. Ross's appraisal. However, Commissioner Whitwell's purpose of the meeting was to gather information and report back to the Board of Control regarding the memorandum that Mr. Makkar had sent to them and Council in response to Mr. Ross's appraisal. In the course of the meeting, Mr. Ross cited specific instances of examples of Mr. Makkar's work that were claimed to substantiate both the praise and the criticism that were contained in his appraisal. Mr. Lewchuk and Mr. Makkar directly raised the allegation that Mr. Ross's appraisal was based on bias. They argued to Commissioner Whitwell that Mr. Ross's claim that Mr. Makkar could not effectively communicate was based solely on the fact that Mr. Makkar speaks with an accent. The transcript also reveals that Commissioner Whitwell stressed that he was renewing his offer to Mr. Makkar to have him come to Commissioner Whitwell's office at any time to discuss concerns. The meeting ended with the Commissioner promising to report the results of the meeting to the Board of Control.

The following day, February 11, 1984, Mr. Ross wrote "a good memo" on a three-line memorandum which had been written by Mr. Makkar. Again, on February 23, 1984, Mr. Ross sent Mr. Makkar a memorandum on a rezoning matter commending Mr. Makkar for his "good work on the file". Indeed, after February 10, 1984 there is no evidence of any specific concerns or difficulties with any work produced by Mr. Makkar.

But it is clear that after the February 10, 1984 meeting, Commissioner Whitwell decided to terminate

Mr. Makkar's employment. Commissioner Whitwell testified that while he had considered the possibility earlier, the February 10th meeting convinced him. Commissioner Whitwell said he considered several factors in deciding to terminate:

- (1) That he did not feel that Mr. Makkar was performing at the level of a Senior Planner. There was no apparent improvement that had taken place since September 1983.
- (3) The amount of time expended by Mr. Ross and Mr. Poot on Mr. Makkar and his reports seemed out of proportion to the time demanded for other employees.
- (4) Commissioner Whitwell did not like what he saw of the presentations of Mr. Makkar at Planning Board and Council.
- (5) Commissioner Whitwell did not feel that Mr. Makkar's motivations were proper in that "the direction of Mr. Makkar's motives were not acceptable."

Clearly, the final straws for Commissioner Whitwell were Mr. Makkar's conduct and responses at the February 10 meeting. Commissioner Whitwell sought and obtained the opinions of Messrs. Poot and Ross on Mr. Makkar's future. Mr. Poot would have terminated Mr. Makkar in the fall of 1983. Mr. Poot felt Mr. Makkar was not accepting criticism or accepting that he was doing anything wrong. After Mr. Makkar exposed the situation to the Board of Control rather than discussing the draft appraisal with Mr. Ross, Mr. Poot felt that they could not "possibly continue to work with Mr. Makkar." Mr. Poot testified that he would have recommended to continue to work with Mr. Makkar but for

Mr. Makkar's "refusal to accept criticism". Mr. Ross credited Mr. Makkar with showing a positive attitude, desire, energy and application to his work up to the time the performance appraisal was given to him. But Mr. Ross felt that Mr. Makkar's reaction to the appraisal indicated a "... dramatically opposite perception of events which, for the year, I had first-hand experience." Mr. Ross considered Mr. Makkar's response as a "rejection of the effort [Ross] had put forward" to assist Mr. Makkar. So, by February, Mr. Ross was in agreement with the decision to terminate Mr. Makkar.

It appears that some thought was given to demoting Mr. Makkar rather than firing him. But this was not considered seriously. Commissioner Whitwell felt at that point that Mr. Makkar was not even functioning at a Planner's level. But more importantly, Commissioner Whitwell felt that a demotion would not help Mr. Makkar's attitude. Mr. Ross recalled that Mr. Makkar had made it clear to him at the outset that Mr. Makkar would consider a demotion as tantamount to a dismissal. No real thought was given by anyone as to whether Mr. Makkar could be transferred to another department within the City's structure where his talents might be considered better suited.

On March 6, 1984 Mr. Makkar was called into Commissioner Whitwell's office and given a letter of termination ending his employment as of that day. Mr. Makkar had been given no formal warning that this was coming. The letter offered severance of approximately six months' salary plus the unconditional access to the assistance of a relocation counselling service. Commissioner Whitwell also told Mr. Makkar to leave the building as soon as possible. Although Mr. Makkar had been both dreading and expecting that this termination was coming, he was stunned by the news and the immediacy of its impact. He managed to gather his things

together as best he could and left the building with the dreadful feeling that he had been terribly wronged.

Since that day, Mr. Makkar has availed himself of the help of the relocation counsellors and made extensive efforts to find work within his field. While this Board of Inquiry did not delve deeply into the matter of attempts to mitigate, it does appear that Mr. Makkar has remained unemployed and without income since his termination despite extensive efforts to find work within his field.

The matter of Mr. Makkar's termination was taken to the Board of Control and ultimately to City Council for review. There was some evidence regarding the conduct of both these proceedings and suggestions were made that they failed to comply with the dictates of natural justice. However, there is no suggestion that either body acted in violation of the Human Rights Code with regard to their consideration of Mr. Makkar's case. Therefore, I shall not dwell upon or comment upon these proceedings except to say that Council ultimately upheld the decision to terminate Mr. Makkar. Mr. Makkar then proceeded with his complaint under the Human Rights Code and launched a civil suit for wrongful dismissal against the City.

It should also be noted that this Board heard the evidence of two City Councillors who testified on behalf of the Commission. Both spoke of the fact that they had dealt with Mr. Makkar professionally and had heard many oral submissions to Planning Board and City Council by Mr. Makkar and other Planners. However, they had never noted any difficulties with Mr. Makkar's reports, performance or presentations.

One of the principal claims made by the Commission is that Mr. Makkar was treated differently than others in his position by management. The prime example of this given by

the Commission was when Mr. Makkar says he was criticized for trivial matters and a record was fabricated to justify the City's ultimate goal of terminating his employment. Mr. Makkar points to instances when he received critical memos that were copied to his file and the Commissioner, whereas others on the staff were equally or more at fault and were treated more leniently. Two examples of this were the Booniewood Road amendment by-law and the "delay" on the Kenworthy Avenue situation. In both cases, Mr. Makkar's immediate supervisors clearly could be faulted for their conduct. However, management either gave no criticism to the supervisor (in the by-law case) or gave far less criticism to Mrs. McCauley than Mr. Makkar received.

Mr. Makkar also suggested that there is no evidence that any other Planners received the kinds or quantities of critical memoranda that he received. In particular, he resented the tone of the memos beginning in 1981 that made it clear to him that his fifteen-year career with the City was in jeopardy as a Senior Planner. In response to this, the City says simply that Mr. Makkar received the memos because he deserved them and that each critique must be read in the context of his overall record of performance. Further, the City says that all the employees were subjected to scrutiny and criticism and received similar treatment. The City also cites the example of Brian Carney, who was a Senior Planner hired under Commissioner Easton and who was fired under Commissioner Whitwell at the age of 47. Further, Mr. Stewart, age 50, was a long-term employee who reached a settlement with the City and retired soon after Commissioner Whitwell's appointment rather than face termination. Again, Mr. Osadchuck had been a Senior Planner who was voluntarily demoted to the Technologist B level after receiving criticisms of his performance under Commissioner Whitwell. Indeed, Mr. Weir was consensually demoted from his supervisory role to a lower position at least partly because

of his unsatisfactory performance. Finally, Mr. Poot offered evidence of a memorandum he had sent to a Senior Planner in 1983 criticizing the work of that Planner (see Exhibit 22). That memorandum is dated March 21, 1983. At that point, that person had been a Senior Planner with the City for approximately eight years and had been with the City for ten. The memo begins, "I regretfully find it necessary to raise some very serious concerns with your handling of reports, applications and applicants, in your capacity as a Senior Planner in the Development Review Division." The memo continues by outlining concerns about complaints received from developers and other staff, a lack of ability to prepare reports on a timely basis and criticizes one report in particular. The memo concludes with a warning that the Planner must improve "very quickly" or Mr. Poot will consider disciplinary action "including possible dismissal." The memo was designed to be sent to Messsrs. Whitwell and Ross and to Personnel. But after Mr. Poot presented the memo to the particular Planner, the Planner discussed it with Mr. Poot and Mr. Poot felt that the reaction was so positive and accepting of the criticism that there was no need to send the memo on further. The memorandum remained only in Mr. Poot's personal file. It was only revealed in response to questions posed in cross-examination. Because that memo was treated as confidential by Mr. Poot until these proceedings, this Board has deliberately refrained from exposing the Senior Planner's name in this award although the reference to the exhibit should make the reference clear to the parties.

Mr. Makkar testified that he felt that Mr. Poot's and Mr. Ross's treatment of him was tainted by their religious and racial prejudices against him as a Sikh and as an East Indian. This belief is founded on the comments that he alleges were made to him earlier in their acquaintances and discussed above. Mr. Makkar also alleges that the department, under the direction of Commissioner Whitwell in

particular, was trying to phase out the older Planners and make room for younger employees of an Anglo Saxton background which would conform to Mr. Whitwell's desired profile of the department. The evidence discloses that approximately 25 people were hired after Mr. Whitwell's appointment. Twenty-four of those people were described as "white" and one was a South Asian who was hired in the position of a data processing clerk which is at the bottom end of the scale in the department. No one over the age of 35 was hired. Most are between 25 and 35 years' old. Commissioner Whitwell, Mr. Poot and Mr. Ross were involved in the selection committees of 18 of the 25 hired, yet they never sat together as a threesome and therefore others had input into the decisions. What is not available to consider and compare is the list of applicants for the various positions. As a matter of routine, the department destroys applications after three months. Therefore, this Board is unable to compare the profile of the applicants to the profile of the successful candidates. Shortly after Mr. Makkar's termination, the City instituted a formal Equal Opportunities Programme designed, "inter alia, to encourage and ensure equal opportunity of employment for minorities and handicapped." Mr. Makkar believes that this was done as a direct result of his complaint to the Human Rights Commission. However, the evidence presented by the Equal Opportunities Co-ordinator makes it clear that the perception of the need for such a programme arose quite independently of Mr. Makkar's case and simply came to fruition soon after his case came to the public eye. The Commission did offer the evidence of one highly qualified and distinguished City Planner who was also a member of a visible minority and over the age of 40. He had applied for a senior job within the department and had not been even interviewed for the position. However, Commissioner Whitwell offered a credible explanation as to why this person was not considered suitable for the position despite his excellent qualifications. Thus, that evidence

was insufficient to establish that that individual's racial or religious background could have been a factor for the department deciding not to hire him.

One major theme of the evidence which has been alluded to already should be addressed in more detail. One of the City's recurring positions was that Mr. Makkar required more supervision and his reports required more management intervention than should be expected of a Senior Planner or what was in fact required of Planners. This is strenuously denied by Mr. Makkar. Brian Carney, who supervised Mr. Makkar briefly between 1974 and 1976, testified that Mr. Makkar was the same as other Planners and measured up to the standards expected of a Senior Planner at that time. Mr. Weir's views of the amount of supervision of Mr. Makkar differed depending on whether it was under Commissioner Easton's or Commissioner Whitwell's regime. Mr. Weir considered Mr. Makkar as an "excellent worker" in terms of quantity of production, but felt Mr. Makkar had problems with organization and presenting arguments in a concise manner. Mr. Weir, conceded, "Under Whitwell he had a problem as far as functioning as a Senior Planner." Mr. Weir estimated that he had spent 30 to 40% more of his time reorganizing reports with Mr. Makkar than with other staff and that this amounted to two to four hours of work a week. Yet Mr. Weir also acknowledges that this resulted in improvements in Mr. Makkar's reports under the Whitwell administration. Ann McCauley also noted that improvement.

Commissioner Whitwell also suggested that more time was spent on Mr. Makkar's reports than others. But none of these witnesses was able to give specific incidents of reports which caused them particular concern other than those filed as exhibits and documented with supporting critical memorandum before this Inquiry. Only Mr. Ross offered concrete examples and he too testified that he spent

"excessive" time with Mr. Makkar's reports in comparison with other staff. Confronted by all that evidence, Mr. Makkar denied its foundation. He testified that no one took special time with him to help him improve his reports. In particular, he points out that Mr. Poot and Commissioner Whitwell never sat down with him to help him try to improve. Mr. Makkar was also not aware of any managerial staff working with him on drafting or redrafting reports to any extent more than they did with other planning staff. In fairness, the evidence is unclear at times whether these managers spent time revising Mr. Makkar's reports rather than dealing with Mr. Makkar personally. What is certain is that Mr. Makkar was not aware of the proportionate amount of time spent on his work compared to others. But it must be accepted from the overwhelming amount of evidence that in fact, since at least 1981, Mr. Makkar's managers were spending more time with him or on his reports than was spent with other Senior Planners.

The Argument

The Board of Inquiry was fortunate to have the assistance of very able counsel for the parties who presented equally thorough and persuasive arguments. The parties' positions have been summarized here. But the following is only an outline of their presentations and does not pretend to do justice to their entirety.

Mr. Laskin presented the argument on behalf of the Commission. He suggested that the case raises two issues. The first issue is whether Mr. Makkar's East Indian and Sikh background was a proximate cause of the treatment he received and his ultimate dismissal from the City. The second issue was whether his age was also a proximate cause.

The theory of the Commission's case is basically that Commissioner Whitwell took over the department with energy and ambition and wanted to rid the department of the old guard to replace them with people of his own kind. Thus, the older Planners were dismissed or forced to accept demotions. Commissioner Whitwell kept only Mr. Poot because of the need for his expertise to effect the transition. The Commission suggests that Mr. Poot had a particular personal dislike of Mr. Makkar dating back to 1973 that was racially motivated. When Commissioner Whitwell took over and Mr. Poot was placed in a close supervisory role over Mr. Makkar, the bias and motives of Mr. Poot and Commissioner Whitwell combined to lead inevitably to Mr. Makkar being terminated.

The Commission concedes that its evidence is largely circumstantial. But the basis of the Commission's case was founded upon what was described as both "objective evidence" and a "lack of objective evidence" against Mr. Makkar. Mr. Laskin submitted that the Commission has established a prima facie case of discrimination beginning with the incident in the restaurant between Mr. Poot and Mr. Makkar in 1973. This Board was urged to accept Mr. Makkar's testimony over Mr. Poot's with regard to what was said and to conclude that this established a serious racial dispute that haunted their working relationship when Mr. Poot came to supervise him in 1981.

Mr. Laskin argues that the objective evidence establishes that Mr. Poot and the Planning Department treated Mr. Makkar differently than others. For example, he cites the writing of memos "out of the blue" criticizing a report and threatening demotion or dismissal, whereas Commissioner Whitwell claimed to have wanted to encourage verbal communication within the department. Secondly, Mr. Poot failed to discuss any of his criticisms with Mr. Makkar

although the evidence establishes that Mr. Poot did discuss problems with Mr. Weir, Mr. Ross and Mrs. McCauley. The Bonniewood Road and Kenworthy Avenue matters were cited as primary examples of disparate treatment. Also stressed was the fact that the critical memos on Mr. Makkar were circulated throughout the department, whereas this was rarely, if ever, done for other staff. All this was offered as proof of disparate treatment.

It was also suggested that Mr. Poot was deliberately attempting to "build a record" against Mr. Makkar and that this was especially evidenced by the documentation of "trivial matters" in memos which were critical of Mr. Makkar but were never even sent to him. It was submitted that if Mr. Poot and Commissioner Whitwell had sincerely wanted to assist Mr. Makkar as they claimed, they never would have acted in the way they did, but instead would have had some direct personal contact with Mr. Makkar.

Mr. Laskin also invited this Board of Inquiry to conclude that Mr. Weir was "pressured" into writing critical memoranda against Mr. Makkar. It was suggested that there was no other explanation for that memo and appraisal under the circumstances. The Commission emphasized what Mr. Laskin called the "complete and utter failure" of the City of Scarborough to produce particulars of its complaints at the time and "despite Mr. Makkar's repeated requests for such."

Further, it was submitted that Mr. Ross lacked candour when he denied saying to Mr. Makkar that Sikhs were troublemakers. It was also suggested that the City's case is "highly suspicious", given that Mr. Poot acknowledged Mr. Makkar's improvements in June 1983 and yet in August 1983, Mr. Poot had decided that termination was required. This is so despite the evidence that nothing occurred to elicit further criticisms of Mr. Makkar during that period and there

is certainly no record of any intervening difficulties. Finally, the circumstantial evidence was also said to consist of the fact that the department never considered a lateral transfer for Mr. Makkar, had not hired another person from a visible minority until after the Equal Opportunity Programme was implemented and only hired people age 35 or younger under the Whitwell regime.

With regard to the City's case, the Commission argued that the claim that Mr. Makkar could not measure up to the new standards of the Whitwell regime did not explain the allegedly unfair treatment that Mr. Makkar received. This Board was also cautioned against relying on trivial criticisms or the "impressionistic evidence" of the City claiming that Mr. Makkar received more supervision than others when neither Whitwell, Poot nor Weir could name reports that they had had to revise or discuss with Mr. Makkar other than the ones that were already filed. Further, since the documents concerned only cover three reports in a four-year period, it was suggested that there was insufficient evidence to rebut the prima facie case of discrimination.

Mr. Laskin conceded that Mr. Ross's evidence was "perhaps ... the most cogent of all against Mr. Makkar." Yet again it was argued that Mr. Ross's claims were not substantiated. It was also suggested that Mr. Makkar acted reasonably and understandably by retaining a lawyer to assist him and ultimately "going public" with his concerns although it was recognized that this contributed, in part, to the City's decision to terminate Mr. Makkar.

In summary, Mr. Laskin suggested that there is evidence of discrimination based on age and racial background and "lack of a cogent reply" by the City which would substantiate its claim that Mr. Makkar failed to perform at

an adequate level. Thus, the Board was asked to draw an adverse inference against the City and find against Scarborough on the balance of probabilities. Mr. Laskin then asked that Mr. Makkar be reinstated in his employment as this would be the only remedy that would redress the alleged wrongs done to Mr. Makkar. On the issue of remedy, the Board was referred to the recent decision concerning Alexander Karumanchiri et al v. Liquor Control Board of Ontario et al., unreported decision of D. Baum, March 4, 1987.

Mr. Lewchuk argued on behalf of Mr. Makkar. Mr. Lewchuk adopted all of the submissions of Mr. Laskin and added the following. Mr. Makkar's decision to hire a lawyer to assist him was said to be both reasonable and necessary under the circumstances of the treatment he was receiving from the City beginning in 1981. Further, the difficulties Mr. Makkar faced with report writing and presentation were characterized as stylistic, rather than substantive. Mr. Lewchuk also emphasized the department's failure to supply particulars of criticisms to Mr. Makkar and failure to supply instructions to him on how to improve. Further, the Board was reminded of the racial overtones of Mr. Makkar's discussions with Mr. Poot and Mr. Ross that support the theory that a Sikh was not wanted in the department. Further, Mr. Makkar's ability to communicate with the Board of Inquiry and the evidence of the two local politicians called by the Commission were said to establish that Mr. Makkar could not be thought to have had a communication problem. This Board was urged to reinstate Mr. Makkar, even to another department, at a similar level of a Senior Planner, but away from the influence and control of Mr. Poot and Commissioner Whitwell.

Mr. Sanderson argued the case on behalf of the City. He stressed that this Board had been given the benefit of a great deal of evidence, and that it was crucial to

distinguish this Inquiry from a case involving unjust dismissal. The issue was said to be whether there was a violation of the Human Rights Code, not whether the Employer was right or whether it had just cause to act as it did.

It was argued that the evidence establishes that Commissioner Whitwell was uniformly hard on all his staff, with the aim of improving the department as quickly as possible. It was suggested that Mr. Makkar has "created a dilusion" with regard to his recall of the events in the restaurant with Mr. Poot in 1973 and has linked that dilusion with race. The only independent witness called on the event was Mr. Easton who recalled no such racial allegations and stated that he would be surprised by accusations that Mr. Poot was prejudiced. Further, it was suggested that Mr. Poot was far too intelligent to make a racial comment against Mr. Makkar as alleged. Also, we were asked to wonder how Mr. Poot could be so racially prejudiced in light of the social relationship enjoyed by the Poot and Makkar families over a period of some years before this incident. Further, Mr. Poot was offered as a credible and sincere witness whose evidence should be accepted over Mr. Makkar's.

In terms of the allegation of unequal treatment, counsel for the City argued that Mr. Makkar received the treatment due to him because of the quality of his work performed. Further, the City's desire to document the critiques was said to be consistent with the act of a reasonable employer advising an employee about concerns over performance and warning the employee of the consequences of failure to meet the standards. Further, the Board of Inquiry was reminded of the cases of other employees who had received critical memos from Mr. Poot. While it was conceded that Mr. Poot's failure to verbally communicate with Mr. Makkar could be considered as counter-productive, it was said that it did not amount to a breach of the Human Rights Code. It

was suggested that the habit of corresponding by memos was fostered by Mr. Makkar's lack of personal response in contrast with the positive reactions received from other employees who had received similar memoranda from Mr. Poot. Further, it was argued that even if Mr. Makkar had received harsh treatment from the City, this would not amount to an offence under the Human Rights Code.

With regard to the Commission's assertion that the City sought to build a false record against Mr. Makkar, it was argued that given Mr. Makkar's performance problem, it would have been irresponsible for management to fail to document the problem. The fact that there was a performance problem was said to be clearly established by the fact that Mr. Poot's judgment was shared by Messrs. Whitwell, Ross and Weir and Mrs. McCauley, even though Mr. Makkar conceded that Mr. Weir and Mrs. McCauley had no animus against him of any kind. Further, Mr. Ross's evidence was offered as the most candid. The Board was asked to consider his evidence in light of the fact of his claim that he had deliberately refrained from learning about or involving himself in the past history of dealings between Mr. Makkar and his supervisors.

In response to the Commission's charge that the City had failed to produce or prove particulars of its allegations against Mr. Makkar, it was argued that the City did not attempt to and need not prove just cause for dismissal in Human Rights complaints. All the City claimed it was attempting to prove was that it had legitimate, bona fide concerns about Mr. Makkar's performance and simply acted upon them. Thus, this case was distinguished from a wrongful dismissal action. Further, Mr. Makkar's demand for particulars in the context of the employee relationship and yearly appraisal system was said to be extremely inappropriate. But in any event, we were reminded that

Mr. Ross had offered particulars and had never been taken up upon the offer.

Counsel for the City also attacked the conspiracy theory of Mr. Makkar as being totally unfounded. First, it was pointed out that while Mr. Poot decided he wanted to terminate Mr. Makkar in the fall of 1983, Commissioner Whitwell and Mr. Ross did not decide until March 1984. Further, Mr. Poot acknowledged in a meeting with Commissioner Whitwell and Mr. Makkar that Mr. Makkar was improving under Mr. Ross's supervision. These inconsistencies were said to be counter indicators that there would be a conspiracy.

In terms of the statistical evidence presented for the Board, counsel for the City argued that no weight should be given to it because no comparative data were available and the information had not been proven to be accurate. Counsel for the City referred to the decision of Professor Cummings in Blake v. Ministry of Correctional Services, Mimico Correctional Institute, unreported, September 10 1984. Further, no evidence other than vague perceptions was said to exist to establish discrimination on the basis of age.

Mr. Sanderson also addressed the Commission's submission that Mr. Poot had harassed Mr. Makkar with "a barrage of unfounded memorandums." Mr. Sanderson argued, that firstly, there are only six memos over a 19-month period and that only the first actually mentioned discipline. Therefore, they ought not to be considered an inordinate amount or unduly harsh in tone. Secondly, the Board was urged to recall that Mr. Makkar denies any wrongdoing with respect to any of the memoranda, despite the fact that Mr. Poot's criticisms were echoed by all the other management witnesses as well.

Counsel for the City also stressed that his client's position was that Mr. Makkar had an honest and genuine perception of discrimination, and that Mr. Makkar is a fine and good person. However, it was submitted that his perceptions had no objective basis. The eloquence of Mr. Sanderson's submissions deserve to be quoted as the following passage summarizes the City's case:

I think what you have seen, Madam Chairman, in this case is a mini-drama, a real slice of employment life, if you will.

There are, in my respectful view, no villains or heroes. There is no conspiracy. There are a bunch of decent people interacting each with the other. They all have warts. They all have failings, sins of omission and commission.

There have been over reactions. There has been modest drama, but there has been no discrimination.

There has been strain, and tension, and there has been concern over employment, concern over performance, and people, all of them together, have been struggling with those things, each with the other.

On the employer's side, there have been these efforts to improve performance of a bunch of people...Mr. Makkar included.

On the employee's side, there has been a very legitimate concern with maintaining employment.

That is the stuff of the human world, I am afraid, in this day and age. That is real, it is palpable, it is living, it is breathing, and our emotional involvement, I am afraid, has to be distanced, and we have to stand back from that, and we have to say "All that being so, has there been discrimination?"

Has there been a breach of the Human Rights Code?

If the answer is "no", the complaint must be dismissed.

Finally, on the question of remedy, the City's position was that if the complaint succeeds, reinstatement would not be appropriate or feasible because of the impossibility of restoring a viable working relationship between the parties given the feelings that have evolved prior to and during these proceedings.

In reply to the City's argument, Mr. Laskin argued that since the City had raised Mr. Makkar's job performance as a defence to the complaint, if the City fails to prove inadequate performance, then the Board of Inquiry should query whether there is another reason for the treatment Mr. Makkar received. If the defence of job performance was not proven, then I was asked to conclude that there is evidence to support the allegation of discrimination. Further, although it was not suggested that the City was at fault for destroying applications that would have provided the basis of comparative data of applicants and people hired, the fact that this is not available should not be held against the City in accordance with the decision of Professor Cummings in Blake v. Ministry of Correctional Services, supra, page 37. However, in any event, the Commission still relies on circumstantial evidence and the remaining evidence to establish its case.

In response to the City's argument that there was a lack of "a barage of memorandums", the Commission argued that if the number and tone of memos are not considered to be large and severe in nature, then one would have to ask why Mr. Makkar had to be dismissed.

The Decision

This Board of Inquiry has had the benefit of a great deal of evidence and very able argument presented on behalf

of all the parties. In addition, we have been fortunate in that although the allegations in the complaint and the defences offered raise very serious and profound issues of personal integrity and honour, the parties have treated each other throughout with the utmost of respect and dignity. Indeed, although Mr. Makkar's allegations were received by the individuals such as Messrs. Poot, Whitwell and Ross with shock, anger and dismay, they all credit Mr. Makkar with having a sincere and bona fide belief in their truth.

However, one of the first tasks facing this Board is the necessity of deciding four major issues of credibility. While credibility is not a major factor in this case, it does need to be resolved in these areas. Sometimes in a case it is easy to judge a witness's evidence as a whole and either completely accept it or dismiss it as not worthy of credit. However, in other cases, a witness may be credible in one area and be less reliable in another. In those situations, each aspect of the evidence has to be reviewed separately. That is precisely the situation that has arisen in this case. There is no key witness who can be accepted as completely reliable or found to be completely untrustworthy. But there are four major issues of credibility that must be determined.

First, it must be decided what occurred in the 1973 luncheon meeting with Messrs. Poot and Makkar. Mr. Makkar claims that Mr. Poot made clear racial remarks and innuendos regarding Mr. Makkar's future in the Department. Mr. Poot claims that no such thing was said and that no allegation of discrimination was raised by Mr. Makkar immediately after the meeting. It would have been desirable to have another witness who had been at the union/management meeting immediately afterwards and who had a clear recall of the allegations that Mr. Makkar actually made at the time. Mr. Easton's evidence was simply of very little or no help. No explanation was given by any party as to why no such other

witness was called. But given the parties' positions, it was equally open for any party to call such a witness and I do not draw an adverse inference on any side for the failure to produce such a witness. I merely comment because I regret the fact of the absence of such a witness. Therefore, I am left with deciding between the evidence of Mr. Poot and Mr. Makkar. In this particular situation, I choose to prefer the evidence of Mr. Makkar. The reason why I reject Mr. Poot's explanations regarding the meeting is quite simply that they do not make sense. If, as Mr. Poot suggests, Mr. Makkar complained to the Union about Mr. Poot being "power hungry", it is hard to imagine why a union/management meeting would ever have had to be convened because that is clearly not a grievable matter or a matter of joint concern. Further, the evidence of Commissioner Whitwell shows that Mr. Poot told Commissioner Whitwell in 1981 that there had been an earlier incident involving alleged discrimination between he and Mr. Poot. This only makes sense if the complaint was indeed about a racial matter and that this was known to Mr. Poot. Finally, Mr. Poot had suggested that Mr. Makkar had complained about their luncheon meeting months after it had occurred. However, all the evidence, including Mr. Makkar's note written at the time, confirms Mr. Makkar's contention that he complained immediately. Therefore, I accept Mr. Makkar's evidence that he recalled Mr. Poot saying, "These jobs are not meant for you and me." Also, I accept that the luncheon meeting left Mr. Makkar with the impression that he had no hopes of advancement in the foreseeable future with the department and should therefore consider resignation. I do not conclude that Mr. Poot ever said, "These jobs are not meant for East Indians" because Mr. Makkar himself admits that it was only his impression that Mr. Poot was trying to say that. I further conclude that as a result of Mr. Poot's comments, Mr. Makkar formed the opinion that Mr. Poot was racially biased and that Mr. Makkar's race and religion were the reasons that he would not receive his promotion to Senior Planner.

However, this does not establish that Mr. Poot was actually racially prejudiced. It would have been much easier to understand what Mr. Poot meant if he had offered an explanation for his words. But faced with Mr. Poot's flat denial, we can only speculate as to what he meant when he said, "These jobs are not meant for you and me." It was quite fair for Mr. Makkar to conclude that Mr. Poot meant to say that senior jobs were not destined for people like Mr. Makkar and Mr. Poot, i.e. persons of an ethnic minority, because Mr. Poot himself was an immigrant. But that is not the only meaning that the words could convey. It would also be possible to conclude Mr. Poot was referring to a shared view of a Planner's role or a shared planning approach or philosophy, or a shared manner of operation in the department. Therefore, from the words alone, it cannot be established that they exhibited or proved racial bias on the part of Mr. Poot despite the fact that Mr. Poot's lack of candour in this area was quite disturbing. Indeed, Mr. Poot's testimony as a whole cannot be said to have been particularly reliable or credible. His description of Mr. Makkar's reaction to a performance appraisal "as violent" was in direct contradiction to Mr. Ross's description of the same reaction. As stated above, it is Mr. Ross's description that seems more reliable and is accepted by this Board. This Board pondered very carefully and very profoundly on the question of why Mr. Poot would say such things and testify the way he did if there was any interest other than a racial animus towards Mr. Makkar.

But I do not conclude that Mr. Poot was in fact racially biased. If he was so biased, it is impossible to conceive how he and his wife could have enjoyed the social relationship they established with the Makkars over a period of years. It is also unlikely that Mr. Poot would have assisted Mr. Makkar with any drives to work or given him

experience driving to get a driver's licence. While the extent of the friendship and assistance was not remembered equally by each of the two men, the fact that these events occurred over a period of a few years is certainly established and accepted by Mr. Makkar. Although there is no question that the relationship soured and turned to dislike after the luncheon, it cannot be accepted that Mr. Poot was racially biased before 1973 or that he exhibited any clear display of bias after that date. Mr. Poot's lack of candour at this hearing does not do him any credit. But, on the whole of the evidence, I conclude that he may have been trying to minimize or excuse some serious managerial errors in judgment, rather than mask a racial prejudice.

The second credibility issue is the one concerning Lorne Ross. This involves Mr. Makkar's allegation that Mr. Ross commented on Sikhs being troublemakers. Again, we are faced with a flat denial by Mr. Ross that such a comment was ever made or even that a conversation about the highly publicized shooting at Osgoode Hall involving Sikhs ever occurred between Mr. Ross and Mr. Makkar. It is difficult to imagine from Mr. Makkar's demeanour as a witness and reputation that he would deliberately invent such a story without some basis in fact. It is also difficult to imagine that the topic of the Osgoode Hall shooting never came up in conversation between the two gentlemen because of its very high profile at the time. Therefore, I accept Mr. Makkar's evidence in this area over that of Mr. Ross's and I am troubled by Mr. Ross's denial. However, the fact that the statement is accepted as being made by Mr. Ross is not determinative of the larger issue of whether Mr. Ross treated Mr. Makkar unequally or in any manner which violates the Code. To decide that, the evidence as a whole must be considered.

The third area of credibility involved a dispute over whether Mr. Makkar's supervisors had to spend a great deal of time and effort supervising his reports. Here we are faced with Mr. Makkar's denial in contrast to the consistent testimony and documented evidence of Messrs. Weir, Ross, Poot and Whitwell and Mrs. McCauley which has been set out above. There is no doubt in my mind that Mr. Makkar was not aware that, on a comparative basis, extensive time was being spent on his reports and that he genuinely believes that the other witnesses were not being accurate. However, I cannot accept Mr. Makkar's evidence in this area. The evidence of the other witnesses is far too consistent with each other and the documentary evidence is far too consistent to be dismissed. Further, for reasons set out more fully below, I do not accept that there was a conspiracy to fabricate evidence or set up the case for Mr. Makkar's termination. Therefore, I conclude Mr. Makkar's supervisors did spend more time revising and rewriting his reports than they did with other Senior Planners. It may be that they did not spend more time with Mr. Makkar personally than with other staff, but his reports did demand more attention than the others.

Finally, the fourth major credibility issue involved the impact of Commissioner Whitwell's appointment upon the department. I must conclude that Mr. Makkar was simply oblivious or unaware of the profound changes occurring in the department starting with Commissioner Whitwell's appointment. Mr. Makkar clearly did not see his role as requiring the changes felt by others. This may be partly due to Mr. Makkar's lack of perception. It may also be due to the fact that Commissioner Whitwell's style was to delegate many of his responsibilities so that Mr. Makkar was not aware of Commissioner Whitwell's presence as keenly as might have been felt by others. Indeed, even Mr. Lewchuk seemed to acknowledge this in the passage from his letter quoted above

when he wrote: "... Possibly the difficulties in the dispute lie in that the department's expectation of the Senior Planner may have changed without notification to Mr. Makkar." This emphasizes that while the department and its demands may have changed, Mr. Makkar was not aware of the changes demanded of him.

It is also important to deal with Mr. Makkar's assertion that management conspired against him. To accept this, this Board of Inquiry would have to conclude that the individuals who supervised Mr. Makkar worked together under a common motivation, direction and/or control and that the purpose was to build up a false case against him. Given the forcefulness and power of character that Commissioner Whitwell exhibited on the witness stand, it is possible to accept that he is capable of spearheading a conspiracy. Also, given the determination exhibited by Mr. Poot, a similar conclusion could be drawn. However, it cannot be concluded on the evidence presented that the conspiracy existed. First, Mr. Makkar himself admits that Mr. Weir and Mrs. McCauley had no animus towards him. The only possible motive for their fabricating their evidence would be to protect their continued employment with the City. However, they were impressive as being honest, forthright witnesses who endeavoured to assist this Board with their evidence even when it was to their own personal embarrassment. Further, with the exception of the Sikh comment mentioned above, Mr. Ross came across as an honest witness with the best and most detailed recall of the events of any of the witnesses. In fact, I fully accept his evidence that he made it clear to both Commissioner Whitwell and Mr. Makkar that he wanted to formulate his own judgment on Mr. Makkar and that Mr. Ross would not participate in any attempt that may have existed by Mr. Poot to falsely terminate Mr. Makkar. Mr. Ross, Mr. Weir and Mrs. McCauley all shared similar views about Mr. Makkar's performance difficulties, even though they rate them with

different degrees of severity. None of those witnesses appear to have the type of personality that would accept pressure to destroy the career of someone like Mr. Makkar for whom they all felt personal affection and respect. Therefore, it cannot be accepted that they directed or formed part of a conspiracy to build up a false case against Mr. Makkar.

Nor can it be accepted that Commissioner Whitwell or Mr. Poot was conspiring to destroy Mr. Makkar. While this Board will indicate below many areas where I am critical of their management style, it cannot be concluded that they conspired here. First, if they had simply wanted to build up a case against Mr. Makkar, it could have been done far more elegantly, quickly and in a more devastating fashion than occurred in this case. Far more documentation could have been generated. Far worse working conditions could have been devised. The process would have lasted less time, as was the case with Mr. Carney. But more convincingly, Mr. Makkar could have been given fewer chances. As it was, Commissioner Whitwell allowed Mr. Weir, Mrs. McCauley and Mr. Ross to all judge Mr. Makkar's work over a period of close to three years. Mr. Ross was deliberately assigned to Mr. Makkar with no previous background knowledge of the situation a full two years after the concerns first arose. If there was a conspiracy, it would have been far easier to have simply assigned one compliant manager or leave Mr. Poot in place long enough to create or fabricate a cause for termination. None of that was done in this case. Therefore, while I accept that Mr. Makkar honestly believes that a conspiracy existed, the evidence does not support his belief.

Unfortunately, it may have been Mr. Makkar's perceptions and belief about the conspiracy that contributed to or led to the problems which gave rise to this case. It seems clear from the City's case that it was Mr. Makkar's

performance coupled with his reaction to any criticisms that led management to conclude in 1984 that the employment relationship was no longer feasible. It is easy to see how this developed. Mr. Makkar honestly believed that Mr. Poot was racially prejudiced and that he and Commissioner Whitwell wanted to push Mr. Makkar out of the department. Thus any criticisms which Mr. Makkar received directly and indirectly from Mr. Poot, Mr. Makkar dismissed and/or resented because he believed they were tainted by the motive of racial hatred. Mr. Makkar perceived the purpose of Mr. Poot's memos to be the following. "... To harass me, to make me feel, and force me to quit, resign." Mr. Makkar says he refused to resign "... because I had a sense of feeling why they wanted to get rid of me, so on that, my conviction, that Poot is biased because of his racial motive, I did not resign [sic]..." Thus, Mr. Makkar did not accept or take seriously any of Mr. Poot's criticisms and did not address any of the substantive concerns contained therein. Nor does Mr. Makkar accept that any of the other criticisms leveled against him were well founded. While all the witnesses except Commissioner Whitwell credit Mr. Makkar with improving his work as a Planner in the years under Commissioner Whitwell's regime, it is difficult to see how Mr. Makkar could improve to an acceptable level as long as he was viewing all criticisms as being unfounded and as the product of racial conspiracy. It therefore follows that management would continue to have concerns about his performance.

One of the best examples of this may have been the Turbania Avenue situation. In that application, Mr. Makkar was criticized for his report and his handling of the matter. However, on the substantive planning issue, it was acknowledged that Mr. Makkar was correct in his views. Because of that, Mr. Makkar dismissed the criticisms he received as unfounded and racially motivated, and he did not seem to understand the substance of the concerns mentioned by management.

This brings us to the crux of the case. Under the Human Rights Code, Mr. Makkar is guaranteed the right of equal treatment with respect to his employment. The Code provides:

4.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

The onus is on the Commission to show that Mr. Makkar did not receive equal treatment in his employment compared to others in similar circumstances. In this regard, the Commission has raised some very substantial allegations against the City.

First, it is clear from the documentation filed that critical memos addressed to Mr. Makkar were immediately copied to Mr. Makkar's managers, Commissioners and his personnel file, almost without exception. The copies were sent off before Mr. Makkar was asked for explanations or even before he had a chance to respond. This is in contrast to other employees who may have received critical memoranda, but who had the benefit of having them kept confidential once they had had a chance to respond. Further, Mr. Makkar was sent critical memos on two occasions when his supervisors were as much or more at fault than he and when they received lesser or no criticisms at all, for example Bonniewood Road and Kenworthy Avenue. On the other hand, while Mr. Makkar alleged that he was the only one to receive critical memos

threatening his career, the evidence reviewed above reveals that not only was he not the only one to receive such memoranda, but he was also not even the only one who was terminated.

Even though I can accept and conclude that there were two aspects of unequal treatment as are mentioned in the paragraphs above, the complaint can only succeed if the Commission can establish on a balance of probabilities that the unequal treatment was based in whole or in part on discrimination because of race, ancestry, place of origin, colour, ethnic origin, creed or age. Unless the unequal treatment is tainted by one or more of these factors, it does not amount to a breach of the Code in this case.

The City's defence to the allegations is simply that Mr. Makkar was treated as he was because of the record of poor performance that he established in relation to the demands placed upon him once Commissioner Whitwell took over the department. The poor performance was alleged to be with regard to Mr. Makkar's report writing and communication skills. If there is no foundation to that defence, this Board could easily infer that the only remaining explanation for the unequal treatment would be discrimination.

I was not presented with the kind or the quality of evidence that would satisfy me that the City had just cause to dismiss Mr. Makkar if I was sitting as a board of arbitration or civil court. To reach that conclusion in that context, at the very least, I would have wanted independent expert planning evidence analyzing the quality of Mr. Makkar's written reports and far more particulars of the alleged poor oral presentations. However, that is not to say that the City has failed to establish that there was a bona fide and rational foundation for the way it treated Mr. Makkar.

Dealing first with the report writing, as mentioned above, I have accepted that all Mr. Makkar's supervisors after 1981 had to spend proportionately more time on reviewing Mr. Makkar's draft reports than was required for other Planners or Senior Planners. The supervisors were consistent in their assessment that while Mr. Makkar's reports were always thoroughly researched and accurate from a technical planning point of view, they lacked organization, economy of expression and persuasive logic. With regard to the oral presentations, the City's evidence was far more impressionistic, but was equally consistent. Repeatedly, witnesses said that Mr. Makkar had difficulty responding to questions and speaking in a logical and concise manner at public meetings. Unfortunately, it was Mr. Makkar himself who convinced this Board of Inquiry of the accuracy of those allegations. Often in Mr. Makkar's testimony, although it was clear that he was trying to respond as helpfully as possible to the questions addressed to him, Mr. Makkar displayed a real inability to directly answer questions precisely or keep to a topic. One example of this bears reproduction. The passage is taken from Mr. Sanderson's cross-examination of Mr. Makkar and is merely indicative of other parts of his testimony.

Q. You knew, I suggest to you, that he [Whitwell] was thoroughly dissatisfied with the performance in the department?

A. Let's put it this way: he may have suggested, but with regard to my own personal standards, here, you're talking about, I don't think we ever, ever discussed those standards.

Q. That wasn't my question.

A. Your question...

Q. I will try it again, Mr. Makkar, and then I will leave this subject.

Were the standards of performance, the standards of excellence under Mr. Easton higher or lower than those under Commissioner Whitwell?

A. That, also, I can simply put this way, if you give me a few minutes to explain it. I would go this way:

Whatever's lower and whatever's higher, Mr. Whitwell...Madam Chairman, I need a few minutes to explain, because this one needs a couple of minutes to explain.

This is a lengthy question...

Q. I would have thought it's the simplest question that I...

A. It's not simple question, Mr. Sanderson.

MADAM CHAIRMAN: Well, I think Mr. Sanderson is entitled to a "yes" or "no" answer, but you are also entitled to explain your answer.

MR. SANDERSON: Oh, absolutely. I have no difficulty with that.

THE WITNESS: Mr. Whitwell, whatever he says he expected highest...and all... I mean, objections, however, I just want to add it, that the new Commissioner was brought in most likely as a result of some political problems, and this is quite common...if I refer you, in the last five, six years, in the Metropolitan Toronto Municipalities, practically all Planning Commissioners, and many department heads have changed...City of North York, City of Etobicoke, City of York, City of East York, including the City of Toronto.

So City of Scarborough was no exception to this rule.

What I'm simply saying is, does it mean Mr. Whitwell wanted to bring higher standards?

I think it was justification on the basis of, to asking them to fire me.

Q. Sorry? I didn't...

A. This was one of the justifications being used. He wanted to have higher standards, so he could fire me.

Q. Are you seriously suggesting...

A. Yes, I'm seriously suggesting...

Q. Listen to my question...that the reason why Mr. Whitwell demanded higher standards in performance from the Planning Department of the City of Scarborough was to justify firing you?

Is that your evidence?

A. I am saying it's possible because, to the best of my knowledge...I want to go another further step...City of Scarborough, prior to Mr. Whitwell, was the only municipality in Ontario, probably in Canada, to introduce the planning system called "secondary plans", and this system was introduced by the former...one of the former Commissioner, Mr. John Bousfield.

This system was, later on, refined, perfected, and implemented by Mr. Easton.

Q. Well, let's get back to Mr. Whitwell, who is the subject to my question to you.

A. So what I'm saying is, the standards...I'm referring to professional standards, were one of the highest, prior to Mr. Whitwell, because the system Mr. Don Easton carried on was very much appreciated throughout the Province, and as a result of that system, many municipalities in Ontario adopted our same planning system.

Q. Now let's get back to what we were discussing.

You suggested. Mr. Makkar, that the reason why Mr. Whitwell had such high demanding standards was to justify firing you.

Is that your position?

A. Well, this may be in his mind, but what I'm saying is, he could use this argument...I'm saying I was fired just because of, basically, prejudice.

Q. Whose prejudice?

A. The management. I'm referring to my supervisors.

[Transcript, Volume IV, pages 167-171]

This Board is very cognizant of the difficulties any witness has facing the stresses of having to testify in the alien context of such an Inquiry. I am also aware that Mr. Makkar's native language is not English and that allowances must be made for this. However, in his position as a Senior Planner, Mr. Makkar can be expected to be able to conduct negotiations and to make oral presentations and defences to Planning Board, City Council and the Ontario Municipal Board. As such, a high degree of oral skill can be demanded. The evidence of many of the witnesses and of Mr. Makkar himself convinced this Board that Mr. Makkar did not display sufficient proficiency to meet the standards of a Senior Planner. In reaching that conclusion, it should be said that the evidence regarding the Lord Roberts Public School was not a factor because I do not feel that Mr. Makkar deserved any of the blame for being placed in such a difficult situation on such short notice. It is small wonder that his presentation on that occasion was not satisfactory. The fact that this Board heard from two City Councillors who did not find fault with Mr. Makkar's presentations does not detract from the overall conclusion that there may have been enough occasions when Mr. Makkar's oral presentations caused sufficient concern for management to have created legitimate grounds to be critical of his ability.

Having concluded that there was legitimate or well founded grounds to criticize Mr. Makkar for his performance, that criticism must be viewed in the context of his treatment as compared to other employees. In this regard, the unequal treatment that Mr. Makkar received in relation to the other

workers has been satisfactorily explained by the City as being the result of him being an employee with an ongoing performance problem. We have seen that other employees were criticized and received discipline for failing to meet Commissioner Whitwell's standards. But viewing Mr. Makkar's situation in the context of a performance problem, it is legitimate and indeed appropriate for supervisors to reduce criticisms in writing, record them in a file and report them to upper management. The severity and tone of the memos will depend not only on the particular problem, but also on the history of critical concerns preceding it. Thus, two employees may well receive different treatment for the same offence, depending on their past record. This was the explanation offered regarding Mr. Makkar's situation and it is accepted as credible to this Board.

There was no evidence presented that comes close to suggesting that Commissioner Whitwell harbored any racial or religious bias towards Sikhs or East Indians. It was really only suggested that he worked in concert with the allegedly biased Mr. Poot to terminate Mr. Makkar. But having concluded that Mr. Poot is not prejudiced and that no conspiracy existed, together with concluding that there were well-founded bases for the criticisms of Mr. Makkar, it cannot be concluded that the treatment that Mr. Makkar received was discrimination based on a prohibited ground.

Further, the evidence presented was insufficient to establish discrimination on the basis of age. It is true that once Commissioner Whitwell took over the Department, at least three people who were over forty found their careers terminated and/or in jeopardy. It is also true that anyone hired under the new regime was under thirty-five. But, as a result of completely unrelated and bona fide reasons, we do not have any evidence of the ages or profiles of the candidates who applied for the positions that opened up under

Commissioner Whitwell in the department. That evidence has simply been lost to us so we cannot compare the applicants with the profiles of those who were hired. Also, the evidence establishes that the planning positions were hired through teams of three-person selection committees. Messrs. Whitwell, Poot and Ross never sat together as a threesome and rarely paired up. Therefore, there was always input from others on the selection process. Further, there is nothing to suggest that they ever exerted an unreasonable influence on selection committees to ensure that young and/or Anglo-Saxon people were the only ones hired. Therefore, there is simply insufficient evidence to conclude that discrimination on the basis of age has been established.

Thus, while Mr. Makkar may well have been treated differently than others, it cannot be concluded that his race, religion, ethnic background, creed, colour or age were factors that contributed to this treatment.

Having reached these conclusions, the function of this Board of Inquiry is officially fulfilled. But, the evidence compels me to make some additional comments. I readily acknowledge that my function here is not to assess whether the City's treatment of Mr. Makkar was "just" in the same way that I would be required to assess that question in a wrongful dismissal action before a board of arbitration or a civil court. But it would be unfair to Mr. Makkar to leave the impression that the evidence convinced me that he was fairly treated. After very careful and difficult consideration of all the evidence, I have concluded that he was not discriminated against in violation of the Human Rights Code. But I have also concluded that he was not treated fairly.

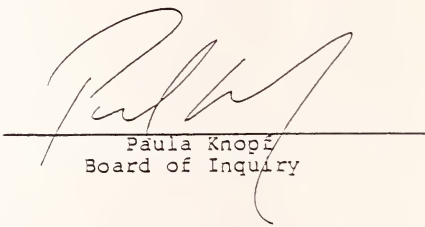
Mr. Makkar was unfairly treated in many ways. First, as soon as Messrs. Poot and Makkar exchanged the first set of

memoranda in 1981, it should have been obvious to all concerned that there was a serious difficulty. Both Mr. Poot and Commissioner Whitwell should have attempted to communicate directly with Mr. Makkar and to have then confirmed those communications in writing whenever necessary to avoid any misunderstandings. This is especially true once Mr. Poot made Commissioner Whitwell aware of the history between he and Mr. Makkar. Secondly, Commissioner Whitwell should have minimized the contact between Mr. Poot and Mr. Makkar given their problems with each other. Mr. Poot should not have been put in a position of being able to do the performance appraisal, if at all possible. But it seems that such reorganization was not even considered. Further, despite repeatedly criticizing Mr. Makkar for poor report writing and oral presentations, the only concrete assistance given to him was from Mr. Ross in the form of the department's mock oral presentations. No other special assistance was given to Mr. Makkar. The constant revision of reports was clearly not helping Mr. Makkar and both internal and outside help could have been offered to him. Further, it was unfair to criticize Mr. Makkar without soliciting his explanation for items such as Lord Roberts Public School or the telephone communication with Ontario Hydro. This unfairness was compounded by including documentation of criticisms in files without even giving him a copy of the criticism to allow him to comment. Because of this, Mr. Makkar was often viewed critically when he was not even aware of a problem existing. Management must be faulted for that. Further, no notion of progressive discipline was seriously considered by the City. The decision was made to jump from critical memoranda to termination without seeing what effect a demotion, a transfer, or a suspension might have had on Mr. Makkar's performance. It may well have turned out to have been counter-productive given the personalities involved, but it would have been only fair to try, given Mr. Makkar's long seniority with the City.

Finally, little or no consideration was given to offering Mr. Makkar the chance of transferring his skills to another department. The events of 1981 to 1984 had culminated in mistrust and strained relations between all concerned. Yet Mr. Makkar's supervisors still recognized that he had talents and expertise in a specialized field. Surely some thought could have been given to attempting to place these talents elsewhere within the City given his extensive seniority and the acknowledged dedication he had always shown to his career with the City. For all these reasons, Mr. Makkar has a legitimate right to feel that he has been unjustly treated by the City. But this conclusion does not empower me to grant any remedy under my jurisdiction under the Human Rights Code because the unfairness is not tainted by any factor which violates the Code.

Thus, at the end of the day, the Board of Inquiry concludes that no breach of the Code has been established. The complaint is therefore dismissed.

DATED at Toronto, Ontario, this 11th day of May, 1987.



Paula Knopf
Board of Inquiry